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Supreme Court, U.S.
FILED

No. 05- 051448 MAY 10 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,

Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 10, 2006

QUESTION PRESENTED

Whether a pension plan sponsor's decision to terminate a plan by purchasing an annuity, rather than to merge the pension plan with another, is a plan sponsor decision not subject to ERISA's fiduciary obligations.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: Petitioner Jeffrey H. Beck, Liquidating Trustee of the Estates of Crown Paper Company and Crown Vantage, Inc., and Respondents PACE International Union, Edward J. Miller, and Jeffrey D. Macek.

Corporate Disclosure Statement: Petitioner is the trustee in bankruptcy of Crown Paper Company and Crown Vantage, Inc. Crown Paper Company was a wholly-owned subsidiary of Crown Vantage, Inc., which itself had no corporate parent. No publicly-traded entity owned ten percent or more of Crown Vantage, Inc.'s stock.

TABLE OF CONTENTS

Question Presented i

Whether a pension plan sponsor's decision to terminate a plan by purchasing an annuity, rather than to merge the pension plan with another, is a plan sponsor decision not subject to ERISA's fiduciary obligations.

List of Parties and Rule 29.6 Statement ii

Table of Authorities v

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdictional Statement 2

Statutes and Regulations 2

Statement of the Case 6

Reasons for Granting the Petition 12

I. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Conflicts with Decisions of the Third and Sixth Circuits and This Court 12

II. The Ninth Circuit Decision Conflicts with the Administering Agencies' Interpretations of ERISA, Which Are Entitled to Deference 14

III. The Ninth Circuit Destabilizes ERISA Law in the Ninth Circuit 15

A. The Ninth Circuit Decision Puts the Benefits of Plan Participants at Risk 15

B. The Ninth Circuit Decision Thwarts ERISA's Objective of Encouraging Employers to Adequately Fund Pension Plans 16

C. The Ninth Circuit Decision Jeopardizes the PGBC's Interest in Obtaining Insurance Premiums from Plan Sponsors 16

IV. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Is Erroneous 17

A. ERISA Does Not Permit Termination by Merger Because Termination and Merger Are Mutually Exclusive 17

B. In Any Event, Merger Is a Plan Sponsor Decision Not Subject to Fiduciary Duties 23

Conclusion 24

Appendix

Ninth Circuit Published Opinion ..... App. 1

Ninth Circuit Unpublished Opinion ..... App. 25

Northern District of California Opinion ..... App. 29

Transcript of Bankruptcy Court Proceedings . App. 51

Bankruptcy Court Orders and Joint Report ... App. 74

Ninth Circuit Order Denying Rehearing ..... App. 84

TABLE OF AUTHORITIES

CASES

Beck v. PACE Int'l Union, 427 F.3d 668 (9th Cir. 2005) ..... *passim*

Beck v. PACE Int'l Union, 146 Fed. Appx. 917 (9th Cir. 2005) 1

Beck v. PACE Int'l Union, 2003 U.S. Dist. LEXIS 2283 (N.D. Cal. Jan. 10, 2003) 1

Bigger v. Am. Commercial Lines, Inc., 862 F.2d 1341 (8th Cir. 1988) 19

Blessitt v. Ret. Plan for Employees of Dixie Engine Co., 848 F.2d 1164 (11th Cir. 1988) 14

Chait v. Bernstein, 835 F. 2d 1017 (3d Cir. 1988) 16

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 13

Franklin v. First Union Corp., 84 F. Supp. 2d 720 (E.D. Va. 2000) 17

Hawkeye Nat'l Life Ins. Co. v. Avis, 122 F.3d 490 (8th Cir. 1997) 16

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 12–13, 18

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 13, 23

Malia v. Gen. Elec. Co., 23 F.3d 828 (3d Cir. 1994) 12

PBGC v. LTV Corp., 496 U.S. 633 (1990) 22
Sutter v. BASF Corp., 964 F.2d 556 (6th Cir. 1992) 12
Waller v. Blue Cross of Cal., 32 F.3d 1337 (9th Cir. 1994) 9

STATUTES

28 U.S.C. § 1254 2
29 U.S.C. § 1001 *et seq.* 7
29 U.S.C. § 1002 ..... 13, 23
29 U.S.C. § 1302 11
29 U.S.C. § 1307 ..... 17, 22
29 U.S.C. § 1322 21
29 U.S.C. § 1341 ..... *passim*
29 U.S.C. § 1344 ..... *passim*
29 U.S.C. § 1412 ..... 5, 18–19
29 U.S.C. § 1441 21

RULES

FED. R. CIV. P. 65 8–9
FED. R. BANKR. P. 7065 9

REGULATIONS

26 C.F.R. § 1.414 19
29 C.F.R. § 2525.104 23
29 C.F.R. § 4041.23 ..... 14, 23
29 C.F.R. § 4041.28 ..... 6, 10, 20

MISCELLANEOUS

57 Fed. Reg. 22168 (May 27, 1992) 22

PETITION FOR A WRIT OF CERTIORARI

Jeffrey H. Beck, Liquidating Trustee for the Estates of Crown Vantage, Inc. and Crown Paper Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decisions of the court of appeals are available at *Beck v. PACE International Union*, 427 F.3d 668 (9th Cir. 2005) (reported), and *Beck v. PACE International Union*, 146 Fed. Appx. 917 (9th Cir. 2005) (unreported), and are reprinted at App. 1–24 and App. 25–28, respectively. The order of the court of appeals denying rehearing and rehearing en banc is reprinted at App. 84–85.

The court of appeals affirmed in part and vacated in part the decision of the United States District Court for the Northern District of California, which is unpublished but available at *Beck v. PACE International Union*, 2003 U.S. Dist. LEXIS 2283 (N.D. Cal. Jan. 10, 2003), and reprinted at App. 29–50.

The district court affirmed the preliminary injunction order entered by the United States Bankruptcy Court for the Northern District of California on February 5, 2002, reprinted at App. 74–76. This order incorporated by reference oral findings of fact and law made on December 11, 2001, and reprinted at App. 51–73. By a stipulation of the

parties approved by the bankruptcy court, the preliminary injunction order was deemed a final judgment on the merits. App. 78, 83.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit entered its judgment and opinions on October 24, 2005, and denied Petitioner's timely petition for rehearing and rehearing en banc on January 10, 2006. Petitioner's application to extend the time to file a petition for writ of certiorari until May 10, 2006, was granted by Justice Kennedy on February 21, 2006. Supreme Court Docket No. 05A769. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

29 U.S.C. § 1341(a), "General rules governing single-employer plan terminations," provides:

> (1) Exclusive means of plan termination.
>
> Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-Day notice of intent to terminate.

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) or a distress termination under subsection (c), the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

29 U.S.C. § 1341(b), "Standard termination of single-employer plans," provides:

(1) General requirements.

A single-employer plan may terminate under a standard termination only if . . .

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date) . . . .

(3) Methods of final distribution of assets.

(A) In general.

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan ad-

> ministrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—
>
> > (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
> >
> > (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1344, "Allocation of assets," provides:

> (a) Order of priority of participants and beneficiaries
>
> In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan . . . .

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

29 U.S.C. § 1412, "Transfers between a multiemployer plan and a single-employer plan," provides:

(a) General authority

A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

29 C.F.R. § 4041.28(c)(1) provides:

> *In general.* The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

STATEMENT OF THE CASE

Petitioner Jeffrey H. Beck serves as the liquidating trustee for Crown Vantage, Inc. and Crown Paper Company (collectively, "Crown"). Crown formerly operated a series of paper mills, through which it employed approximately 2600 workers, many of whom were represented by the PACE International Union (PACE) through collective bargaining agreements. App. 4, 55. In March 2000, Crown filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of California. App. 4.

Members of Crown's board of directors served as trustees for the twelve employee pension plans at issue in this case. App. 4. In the bankruptcy, the Pension Benefit Guaranty Corporation (PBGC) filed proofs of claims totaling millions of dollars for the liability it would be forced to assume if it took over Crown's pension plans. The bankruptcy court viewed the continued existence of Crown's pension plans as a "stumbling block" to plan confirmation. *Id.*

To advance the confirmation of a Chapter 11 plan, Crown investigated the possibility of effecting a "standard termination" of the plans under 29 U.S.C. § 1341(b) in July of 2001. App. 4. Specifically, Crown explored termination through purchase of an annuity for plan participants. *Id.*

While Crown investigated terminating the plans, PACE proposed that Crown merge the plans into the PACE Industrial Union Management Pension Fund (PIUMPF). App. 5.

In October 2001, Crown's board met to review a series of final annuity bids. Based on a variety of advantages provided by termination through annuitization, including but not limited to the financial security of the annuity, Crown's board approved and immediately consummated the purchase of an $84 million annuity from Hartford Life Insurance Company. App. 6–7. In opting to terminate the plans by purchase of the Hartford annuity, the Crown board did not accept PACE's alternative merger proposal. *Id.*

In November 2001, respondent PACE, along with respondents and plan members Miller and Macek, filed this adversary action in the Northern District of California, which was referred to that district's bankruptcy court wherein the Crown bankruptcy proceeding was pending. Respondents alleged that Crown had breached its fiduciary duties to plan participants under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, by failing adequately to consider PACE's merger's proposal before purchasing the Hartford

annuity. Respondents sought, *inter alia*, preliminary and permanent injunctive relief restraining Crown from distributing the $5 million plan surplus to Crown creditors and voiding the Hartford annuity purchase. App. 7.

In a telephonic hearing on Respondents' application for a preliminary injunction, the bankruptcy court ruled from the bench that although termination of pension plans is a business decision not subject to ERISA fiduciary duties, discretionary actions taken to *implement* that decision carry a fiduciary responsibility. App. 65–66. The bankruptcy court then concluded that merger into an ongoing plan is a method of terminating pension plans and therefore any decision concerning merger was subject to ERISA's fiduciary obligations. App. 66 As Crown did not make an "intensive and scrupulous investigation" of the possible merger, App. 65, the bankruptcy court ruled that Crown violated its fiduciary duties to the plan participants. App. 66–67.

On that basis, the bankruptcy court partially granted PACE's application for a preliminary injunction. The bankruptcy court declined to void the Hartford annuity purchase, but did order the plan surplus proceeds (the "reversion") frozen pending a final decision on disposition of the reversion. App. 67. The bankruptcy court later issued a written order incorporating by reference its oral preliminary injunction order. *See* App. 74–76. By a stipulation of the parties approved by the bankruptcy court, the court's preliminary injunction order was deemed a final ruling on the merits, in

accordance with FED. R. CIV. P. 65(a)(2) and FED. R. BANKR. P. 7065. App. 78, 83. By the same stipulation approved by the bankruptcy court, the parties agreed to a mechanism for distribution of the reversion to plan participants. App. 79–81. The distribution of the reversion has been suspended during the pendency of the ensuing appeals.

Crown appealed to the district court, arguing, *inter alia*, that its refusal to fully consider PACE's merger proposal was a plan sponsor decision not subject to ERISA's fiduciary obligations. The district court affirmed the bankruptcy court, holding that a plan termination could be effectuated by merger under 29 U.S.C. § 1341(b)(3), and that merger (as a means of implementing a decision to terminate) was subject to ERISA fiduciary obligations. App. 46–47.

Crown appealed the district court decision to the Ninth Circuit, which began its analysis by observing that a decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, whereas the implementation of such a decision to terminate is subject to ERISA's fiduciary obligations. App. 9 (citing *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342–44 (9th Cir. 1994)). Thus, in the Ninth Circuit's view, whether Crown had any fiduciary obligations with respect to considering Crown's proposed merger turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." App. 9. Crown argued that merger is not a permissible means of termination, and that in any event, a plan sponsor decision regarding merger is not subject to ERISA fiduciary duties.

The court of appeals held, based on 29 U.S.C. § 1341(b)(3)(A) and 29 C.F.R. § 4021.28(c)(1), that merger is a form of termination permitted by ERISA. App. 11–15. The relevant statutory language relied upon by the Ninth Circuit provides that in terminating a plan, a plan administrator may distribute plan assets by purchasing "'irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or . . . otherwise fully provide all benefit liabilities under the plan.*'" App. 11–12 (quoting 29 U.S.C. § 1341(b)(3)(A) (i), (ii); emphasis by the court). The regulation cited by the Ninth Circuit provides: "'The plan administrator must . . . distribute plan assets . . . by purchase of an irrevocable commitment from an insurer *or in another permitted form.*'" App. 12 (quoting 29 C.F.R. § 4021.28(c)(1); emphasis by the court). Based on this language, the Ninth Circuit held that "neither the statute nor its implementing regulations preclude mergers into multiemployer plans as a method of providing such benefit liabilities." App. 15.

In response to Crown's argument that ERISA treats terminations and mergers through wholly separate sections of the statute, the Ninth Circuit noted that both sections in question are placed in the same ERISA subchapter, "Plan Termination Insurance." According to the Ninth Circuit, "[i]t would have been logical for Congress to" lodge both statutes in the same subchapter, because "one practical effect of a merger or complete transfer is that at least one pension plan will cease to exist." App. 13.

As noted above, the premise of the Ninth Circuit's decision was that a plan sponsor's *implementation* of a termination is subject to fiduciary duties, even if the decision to terminate itself is not subject to such duties. Given the court's finding that merger into an ongoing plan is a "means of termination," App. 16, it necessarily followed that Crown's rejection of PACE's merger proposal was subject to ERISA's fiduciary obligations. The Ninth Circuit concluded that that Crown had violated those fiduciary duties by focusing on "an improper set of interests" in rejecting PACE's merger proposal. App. 20.

Crown, supported by the Department of Labor and the PBGC as separate *amici curiae*,[1] petitioned the Ninth Circuit for panel rehearing or rehearing en banc. In its submission, the PBGC noted that "[t]he [panel] decision represents an unprecedented interpretation of [ERISA] Title IV that will frustrate PBGC's administration of the termination insurance program and put participants' pension benefits at risk." PBGC Amicus Curiae Br. at 2.

The court of appeals denied the petition on January 10, 2006.

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[1] The PBGC is a federal corporation established by ERISA with the authority to appear in court represented by its own counsel. *See* 29 U.S.C. § 1302. Thus, the PBGC's amicus submission in support of Petitioner was separate from the submission of the Department of Labor.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Conflicts with Decisions of the Third and Sixth Circuits and This Court

The Ninth Circuit's decision in this case that Crown was subject to ERISA fiduciary duties when it rejected PACE's merger proposal squarely conflicts with decisions of the Third Circuit and Sixth Circuit holding that decisions concerning the merger of pension plans are *not* subject to ERISA's fiduciary obligations. *See Malia v. Gen. Elec. Co.*, 23 F.3d 828, 833 (3d Cir. 1994) ("Efforts by an employer to merge two pension plans do not invoke the fiduciary duty provisions of ERISA. Such duties do not attach to business decisions related to modification of the design of a pension plan."); *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) ("BASF's decision to merge the two plans . . . clearly constituted the establishment or amendment of a pension plan and is therefore a business decision that should not be overturned by the court in the absence of violation of state or federal law.").

The Third Circuit's holding in *Malia* and the Sixth Circuit's holding in *Sutter* represent applications of the rationale of a series of this Court's ERISA decisions. In these decisions, this Court has held that the modification, amendment, or termination of an ERISA plan is a business decision not subject to ERISA's fiduciary obligations. *Hughes*

Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). This rule stems from ERISA's definition of fiduciary.[2] *See Lockheed*, 517 U.S. at 890 ("Because the defined functions in the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.") (citation and brackets omitted).

A decision to merge (or not merge) a pension plan implicates the same concerns as those involving the modification, amendment, or termination of plan: plan structure, entitlement to benefits, and amount of benefits. *See Hughes*, 525 U.S. at 444 ("In general, an employer's decision to amend a pension plan *concerns the composition or design of the plan itself* and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets.") (emphasis added). Thus, the Ninth Circuit's decision in this case conflicts with the rationale of this Court's decisions in *Hughes*, *Lockheed*, and *Curtiss-Wright*, because a merger implicates the composition or design of a plan just as much as a termination, amendment, or modification.

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[2] ERISA defines a "fiduciary" as a person who possesses "discretionary authority or . . . control respecting management of [a pension plan or] . . . discretionary authority or . . . responsibility in the administration of [a pension plan]." 29 U.S.C. § 1002(21)(A).

II. The Ninth Circuit Decision Conflicts with the Administering Agencies' Interpretations of ERISA, Which Are Entitled to Deference

Courts "owe great deference to the interpretations and regulations of the [PBGC] . . . and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA." *Blessitt v. Ret. Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988). As noted above, both the Labor Department and the PBGC urged the en banc Ninth Circuit to vacate the panel opinion and reverse the district court decision. The Labor Department argued that under this Court's decisions, a plan sponsor's decision regarding merger, as a decision regarding the structure of the plan, is not subject to ERISA fiduciary obligations. The PBGC argued that under ERISA, termination may not be implemented by merger. The views of these agencies are entitled to deference.

Moreover, the Ninth Circuit's holding conflicts with various PBGC regulations, all of which make clear that merger is not a permitted means of termination. For example, 29 C.F.R. § 4041.23(b)(9) requires that a plan sponsor notify plan participants that termination will end the PBGC's guarantee of their plan benefits. However, under the Ninth Circuit's decision, merger (as the implementation of termination) will not end the PBGC's guarantee because the plan assets are transferred to the new plan, where the guarantee continues.

III. The Ninth Circuit Destabilizes ERISA Law in the Ninth Circuit

The ramifications of the Ninth Circuit decision are not limited to the parties in this case. The Ninth Circuit decision destabilizes ERISA law in a way that impacts the rights of all ERISA plan participants in that circuit, as well as the planning and administration of all ERISA-regulated entities in that circuit. In addition, the Ninth Circuit decision jeopardizes the interests of the PBGC, the federal agency with primary responsibility for regulating ERISA plans.

A. The Ninth Circuit Decision Puts the Benefits of Plan Participants at Risk

As discussed below, ERISA requires that in a standard termination, plan participants receive their full benefits, either directly by a cash payment, or indirectly through the purchase of annuity that itself guarantees full payment of plan benefits. In any event, whatever the means of the distribution of plan assets in standard termination, ERISA requires that the distribution provide full plan benefits. As discussed below, however, a merger simply does not guarantee that plan participants will receive their full plan benefits.

B. The Ninth Circuit Decision Thwarts ERISA's Objective of Encouraging Employers to Adequately Fund Pension Plans

As discussed below, *infra* Part IV.A, ERISA provides that upon distribution of all benefit liabilities in a standard termination, a plan sponsor can choose to retain any surplus assets in the plan. *See* 29 U.S.C. § 1344(d). By reducing or eliminating plan sponsors' entitlement to the residual assets of overfunded pension plans, the Ninth Circuit decision discourages plan sponsors from adequately funding their pension plans. *See Hawkeye Nat'l Life Ins. Co. v. Avis*, 122 F.3d 490, 502 n.7 (8th Cir. 1997) (depriving employers of residual plan assets could encourage employers to underfund plans); *Chait v. Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988) (same). This result is inconsistent with ERISA's policy of encouraging adequate employer funding of pension plans and is manifestly contrary to the public interest.

C. The Ninth Circuit Decision Jeopardizes the PGBC's Interest in Obtaining Insurance Premiums from Plan Sponsors

The Ninth Circuit decision jeopardizes the PGBC's interest in obtaining insurance premiums from plan sponsors for funding the PGBC's statutory obligations. In its amicus submission in the Ninth Circuit, the PGBC explained:

> By holding that a termination can be accomplished by merger, the [panel] has also

> created a basis for the failure to pay insurance premiums in mergers of the kind involved here. Because mergers combine rather than satisfy benefit liabilities, a plan sponsor's obligation to pay statutory premiums under 29 U.S.C. § 1307 continues. Terminations, however, halt the accrual of premiums; if termination can be accomplished by merger, sponsors may seek to merge to avoid their premium obligations.

PGBC Amicus Curiae Br. at 14–15.

IV. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Is Erroneous

A. ERISA Does Not Permit Termination by Merger Because Termination and Merger Are Mutually Exclusive

The crux of the Ninth Circuit's decision is its conclusion that ERISA permits termination of a single-employer pension plan by merger into a multi-employer pension plan. This conclusion is erroneous as a matter of law because termination and merger are mutually exclusive under ERISA. *See Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 729 (E.D. Va. 2000) ("The law distinguishes between a merger of a plan and a termination of a plan."). In short, termination results in a distribution of plan assets *outside* of the ERISA-regulated regime, whereas merger merely shifts assets from one ERISA-regulated plan to another.

ERISA provides for (i) terminations of single-employer pension plans, on the one hand, and (ii) mergers of such plans, on the other hand, in two wholly separate sections of the statute, *i.e.*, 28 U.S.C. § 1341 (contained in "Subtitle C—Terminations") and 28 U.S.C. § 1412 (contained in "Subtitle E—Part 2 Merger or Transfer of Plan Assets or Liabilities"). Neither section authorizes a plan administrator to implement the termination of a single-employer pension plan through a merger.

On the contrary, the "exclusive" mechanism for terminating a single-employer pension plan is set forth in Section 1341. *See* 29 U.S.C. § 1341(a)(1) ("Exclusive Means of Plan Termination"). Section 1341 provides that "a single-employer plan may be terminated *only*" under Section 1342 (involuntary termination of financially troubled plans), Section 1341(b) (standard termination), or Section 1341(c) (distress termination). *Id.* (empasis added). Subsections (b) and (c) of Section 1341 "concern the two ways by which an employer may voluntarily terminate a plan," *Hughes*, 525 U.S. at 446, and "these means constitute the *sole* avenues for voluntary termination." *Id.* (emphasis added). Section 1341's "exclusive" termination procedures do not reference the term "merger," nor do they identify merger as one of the "exclusive" ways to terminate a plan.

An entirely different ERISA provision, Section 1412, governs the merger of a single-employer plan, like the Crown plans at issue here, into a multiemployer plan, like PIUMPF. *See* 29 U.S.C. § 1412. Section 1412 is the only ERISA section that

authorizes such a merger, and it does not provide that a merger is a form of termination. Indeed, under the *expressio unius* canon of construction, Section 1412(a) implies that no other section of ERISA applies to mergers: "A transfer of assets or liabilities between, or merger of, a multiemployer plan and a single-employer plan *shall satisfy the requirements of this section*." 29 U.S.C. § 1412(a) (emphasis added).

Under the Ninth Circuit's decision, the separate statutory provisions governing merger and termination would *both* apply when merger is used as a means of termination. That is impossible, however, because termination under Section 1341 and merger under Section 1412 are subject to conflicting requirements and produce different results.

First, and most pertinent to this case, termination under Section 1341 *allows* for reversion of surplus plan funds to a plan sponsor upon termination because in termination, the plan's liabilities are fully satisfied. *See* 29 U.S.C. § 1344(d); *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1345 (8th Cir. 1988) ("Under section 1344, a plan sponsor may recapture all surplus assets after a termination of a plan if certain criteria are satisfied"). Merger, on the other hand, does not permit any reversion of funds to the employer, because in a merger *all* assets of the merged funds are transferred to the acquiring fund for future satisfaction of benefit liabilities. *See* 26 C.F.R § 1.414(l)-1(b)(2). Thus, merger, which *precludes* reversion of surplus funds, cannot be a means of termination, which *allows* reversion.

Second, a standard termination of a single-employer plan under ERISA requires a distribution that *guarantees* to provide "all benefit liabilities" under the plan. ERISA Section 1341(b)(3)(A) provides that in "any final distribution of plan assets" in a standard termination, the plan administrator shall "purchase irrevocable commitments from an insurer to provide *all benefit liabilities* under the plan" or "*otherwise fully provide all benefit liabilities* under the plan." 29 U.S.C. § 1341(b)(ii) (emphasis added).

Prior to the Ninth Circuit's decision in this case, the only recognized methods of satisfying Section 1341(b)(3) were (i) to pay each plan participant in full, *see* 29 C.F.R. §§ 4041.28(c)(2), (4) (if a plan permits, benefits may be distributed in the form of a one-time lump sum payment under Section 1341(b)(3)(A)(ii)), or (ii) to purchase an annuity guaranteed to pay each plan participant in full, *see* 29 U.S.C. § 1341(b)(1)(D) (permitting employers to implement a standard termination by purchasing "irrevocable commitments from an insurer to provide all benefit liabilities").

Merger of a single-employer plan into a multi-employer plan, however, carries no guarantee of immediate or future payment of *full* plan benefit liabilities. A multiemployer plan could never satisfy Section 1341(b)'s guarantee of full payment of pension benefits because, following a merger, ERISA does not provide full protection for the benefits owed to the participants of a former overfunded single-employer plan. Instead, participants of a single-employer plan must rely on the continuing solvency

of the multiemployer plan, which is by no means assured in fact or in law. Once assets of a single-employer plan have been transferred to a multiemployer plan, those assets are available to satisfy the benefit liabilities of *all* participants in the multiemployer plan, not merely the participants in the former plan. Precisely because merger (unlike termination) does not *guarantee* a plan participant's full benefits, the Ninth Circuit erred in holding that Section 1341(b)(3) allows for merger as a means of termination.[3]

Third, under a standard termination, the plan sponsor is required to distribute plan assets in accordance with Section 1344. *See* 29 U.S.C. § 1341(b)(3). Under Section 1344, "in the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan . . . *among the participants and beneficiaries of the plan.*" 29 U.S.C. § 1344(a) (emphasis added). In a merger, however, the plan's assets are not distributed to plan

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[3] If the multiemployer plan becomes insolvent and is subsequently terminated, the consequences to the plan participants of the former single-employer plan are disastrous. First, under Section 1441, the sponsors of the multiemployer plan would be required to reduce the benefits to which the participants of the single-employer plan formerly were entitled. *See* 29 U.S.C. § 1441. Second, only approximately $13,000 of those reduced annual benefits would be guaranteed by the PBGC and any additional amount owed to a participant could be recovered, if at all, only from the insolvent multiemployer plan. *See* 29 U.S.C. § 1322(a). The participants in the formerly fully funded single-employer pension plan simply would not receive their full retirement benefits.

participants and their beneficiaries; instead, the assets are transferred to the acquiring multiemployer plan, where the assets would be available to pay *all* benefits of *all* participants in the multiemployer plan.

Fourth, because a standard termination fully satisfies benefit liabilities to plan participants, termination extinguishes the PBGC's obligation to guarantee certain minimum benefits under a terminating plan. *PBGC v. LTV Corp.*, 496 U.S. 633, 639 (1990). In a merger, however, a participant's accrued benefit is not satisfied, and the merger does not extinguish the PBGC's guarantee.

Fifth, a termination of a single-employer plan ends a plan sponsor's obligation to pay insurance premiums to the PBGC, precisely because the liabilities to plan members are satisfied by the termination's distribution. *See* 29 U.S.C. § 1307(a); 57 Fed. Reg. 22168 (May 27, 1992). Merger, however, does *not* end a plan sponsor's obligation to pay insurance premiums to the PBGC. *See* 29 U.S.C. § 1307(e)(1). If merger is a valid means of termination, as the Ninth Circuit decision holds, then the obligation to pay premiums would seemingly be ended. Such a result would leave the PBGC to insure unpaid plan benefits, without any payment of insurance premiums.

Sixth, in a termination, the plan administrator must comply with stringent notice requirements to participants in advance of the distribution of plan proceeds. *See* 29 U.S.C. § 1341(a)(2). The required notice must inform participants that upon distribu-

tion, the PBGC's guarantee is extinguished. 29 C.F.R. § 4041.23. In a merger, however, participants receive notice after the fact, 29 C.F.R. § 2525.104-4, and as noted above, the PBGC's guarantee continues.

In sum, termination and merger are different in kind under ERISA. The two procedures are governed by different statutes, subject to different requirements, and produce different results: termination results in the end of an ERISA-regulated plan, while merger results in continuance of the plan (in a different form) under the ERISA regime. The Ninth Circuit's holding that termination can be effected by merger is simply wrong.

B. In Any Event, Merger Is a Plan Sponsor Decision Not Subject to Fiduciary Duties

The Ninth Circuit's decision is wrong for a second and independent reason. Under ERISA, fiduciary duties only attach to the exercise of "discretionary authority or . . . control respecting management of [a pension plan or] . . . discretionary authority or . . . responsibility in the administration of [a pension plan]." 29 U.S.C. § 1002(21)(A). As discussed above in Part I, *supra*, this Court's decisions teach that a plan sponsor's decisions regarding plan design or structure are not subject to fiduciary obligations. *See Lockheed*, 517 U.S. at 890. As merger involves a decision regarding plan structure or design, it simply cannot be subject to fiduciary review.

CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 10, 2006

APPENDIX

App. 1

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellant,

v.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBER AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS;

EDWARD MILLER; JEFFREY D. MACEK,
ON BEHALF OF THEMSELVES
AND OTHERS SIMILARLY SITUATED,
Defendants-Appellees.

PACE INTERNATIONAL UNION, AFL-CIO,
CHEMICAL & ENERGY WORKERS INTERNATIONAL
UNION, ON BEHALF OF MEMBERS AND FORMER
MEMBER PARTICIPANTS IN PENSION PLANS,
Defendant-Appellant,

v.

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellee.

No. 03-15303, No. 03-15331

App. 2

United States Court of Appeals
for the Ninth Circuit

427 F.3d 668

November 4, 2004, Argued and Submitted
October 24, 2005, Filed

Stephen A. Kroft (argued), Rodger M. Landau, Los Angeles, California, for the appellant/cross-appellee.

John Plotz (argued), Christian L. Raisner, Oakland, California, for the appellees/cross-appellant.

Before: Stephen Reinhardt, Richard A. Paez, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Paez.

PAEZ, Circuit Judge:

In the course of Chapter 11 liquidation proceedings, debtors Crown Vantage, Inc. and Crown Paper Co. (Crown) decided to terminate Crown's pension plans through the purchase of an annuity, rather than by merging the plans into a multiemployer plan sponsored by PACE International Union (PACE). Plan participants and PACE filed an adversary action against Crown in bankruptcy court, alleging that Crown's directors breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001–1461, by failing to consider adequately the proposed merger. The bankruptcy court agreed and issued a preliminary injunction ordering that Crown maintain the

residual assets -- approximately $ 5 million -- in the plan in an interest-bearing account pending a final decision on the allocation of the assets. Pursuant to the bankruptcy court's order, the parties submitted a joint plan for the distribution of the residual assets for the benefit of the plan participants and stipulated that the court's ruling on the preliminary injunction could be treated as a final ruling on the merits under Federal Rule of Civil Procedure 65(a)(2). The bankruptcy court approved the plan.

As in the bankruptcy and district courts, Crown[1] argues that it did not breach its fiduciary duties to plan participants and beneficiaries because merger into a multiemployer plan is an impermissible means of terminating a pension plan under ERISA, its implementing regulations, and the terms of the pension plan. PACE cross-appeals the district court's determination that it lacked standing to pursue an appeal.

We have jurisdiction pursuant to 28 U.S.C. § 158(d). We hold that under ERISA and its regulations, merger into a multiemployer plan is not a prohibited means of terminating a pension plan, and that the bankruptcy court did not err in concluding that Crown breached its fiduciary duties by failing to consider thoroughly PACE's proposal

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[1] Appellant Jeffrey H. Beck is the liquidating trustee of the Crown estates. Because the actions of Crown's board of directors, the trustees of the pension plans, are the focus of this action, however, we refer to Crown as the appellant.

and discharge its duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). With respect to PACE's cross-appeal, we vacate the district court's judgment on that issue with directions to remand to the bankruptcy court for further proceedings.[2]

I. Facts and Procedural History

Crown Vantage, Inc. was the parent company of Crown Paper Co., which operated seven paper mills in the Eastern United States and employed 2600 workers. The employees were covered by collective bargaining agreements with PACE. Members of Crown's board of directors were also the trustees for its eighteen pension plans.

In March of 2000, Crown filed for Chapter 11 bankruptcy and began liquidating its assets. *See generally In re Crown Vantage, Inc.*, 421 F.3d 963, 967–68 (9th Cir. 2005). The Pension Benefit Guarantee Corporation (PBGC) filed proofs of claims totaling millions of dollars for the liability it would have been forced to assume if it had taken over Crown's pension plans. The bankruptcy court viewed PBGC's proofs of claims as a "stumbling block" to Chapter 11 plan confirmation. In July of 2001, Crown's board began to obtain quotes for the purchase of an annuity as a means of effecting a "standard termination" of the plans under Section 4041(b) of ERISA, 29 U.S.C. § 1341(b).

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[2] In a separate memorandum disposition filed today, we address the remedy imposed by the bankruptcy court.

During the summer of 2001, PACE proposed a merger of the seventeen pension plans that covered Crown's hourly employees into the PACE Industrial Union Management Pension Fund (PIUMPF), a Taft-Hartley Act multiemployer pension fund founded in 1963 for PACE union members. PACE preferred this option because PIUMPF in prior years had paid a thirteenth monthly check during the year, and thus merger offered the possibility that retirees might receive more than the minimum benefits. Additionally, PACE preferred the proposed merger because PIUMPF provided an established dispute resolution program for plan participants.

Crown's counsel met with a PACE representative in August of 2001 to discuss the merger, and expressed the view that Crown wanted to be assured of the financial stability of PIUMPF and the legality of the merger. The parties agreed that their attorneys and actuaries would further investigate the PIUMPF merger. On September 26, 2001, PIUMPF's actuary reported that the merger was feasible, and Crown's counsel requested more information from PIUMPF's counsel. That same day, Crown's board of directors met and reviewed bids for annuities, and learned that a "reversion" to the company of remaining assets in the plan would be possible if it terminated twelve of the pension plans through the purchase of an annuity.[3] The

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[3] The twelve plans were identified because they were "overfunded" and would therefore yield a surplus after the annuity had been purchased. Crown merged these twelve plans into one "Merged Plan" in order to purchase

(continued...)

board also learned about the proposed PIUMPF merger, and agreed to compare it to the annuity options once it received final bids.

On October 1, 2001, PIUMPF's counsel sent Crown's counsel a draft merger agreement. On October 4, Crown's counsel stated at a hearing in the bankruptcy court that it was looking into the possibility of a merger with PIUMPF. At this hearing, counsel represented that "before an action is taken as to these pension plans," the court would be notified. On October 8, PIUMPF's counsel sent Crown more information about the financial stability and legality of the merger.

Crown's board met on October 9, 2001, to review the final annuity bids with the understanding that they would expire within twenty-four hours. The bankruptcy court determined that the board did not seek a waiver of this deadline. At the time of the meeting, the board faced a forty-five day timetable for dissolving Crown, and Crown had $ 10,000 or less in the bank. The board did not consider the PIUMPF merger at this meeting, and it did not ask its actuary to analyze the proposed merger. Minutes of the October 9 meeting reflect that PBGC had agreed to release Crown under an annuitization of the pension plans, but not in a merger. The

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the annuity. The remaining five pension plans covering hourly workers were to remain the responsibility of Georgia Pacific Company, the successor to a prior plan sponsor.

bankruptcy court found that the board did not pursue a release from PBGC for a merger with PIUMPF. The board decided to purchase an annuity as a means of terminating the twelve merged pension plans (the Merged Plan) through Hartford Life Insurance Company, on the basis of Hartford's financial stability and a projected maximum reversion of nearly $5 million to Crown. Crown deposited over $84 million with Hartford the next day.

Appellees Edward Miller and Jeffrey Macek, on behalf of themselves and other similarly situated plan participants, and PACE, on behalf of its members and former member plan participants, filed suit in bankruptcy court. The plaintiffs alleged that Crown breached its fiduciary duties under ERISA by failing to "perform a diligent investigation into the PIUMPF [merger] proposal," and by failing to discharge its duties "solely in the interest of the participants and beneficiaries." After rendering oral findings of facts and conclusions of law, the bankruptcy court granted a preliminary injunction, ordering all cash assets remaining in the pension plan to be placed in an interest-bearing account, and that no reversion of assets to Crown could occur, pending the court's final decision on the allocation of the assets. The bankruptcy court also ordered the parties to report on the feasibility of distributing the reversion "for the benefit of the pension plan participants." Although the plaintiffs asked the bankruptcy court to void the annuity transaction with Hartford, the court declined to do so and allowed Crown to complete the termination process.

The parties stipulated to having the bankruptcy court's findings of fact and conclusions of law deemed a final ruling on the merits, and submitted a joint report setting forth a procedure for distribution of the residual assets for the benefit of the plan participants. The bankruptcy court entered an order approving the distribution of the assets to the plan participants. As noted, the court left the preliminary injunction in effect pending implementation of the distribution. Although no final judgment was entered, in light of the parties' stipulation we treat the district's order granting the preliminary injunction as the final judgment.

On appeal to the district court, Crown argued that neither appellees Miller and Macek nor PACE had standing and that it was neither subject to fiduciary obligations in terminating the plan, nor did it breach such duties. The district court held that appellees Miller and Macek had standing as plan participants to enforce Crown's fiduciary obligations, but dismissed PACE for lack of standing, because it was not an enumerated party under ERISA.[4] The district court affirmed the bankruptcy court's determination that Crown breached its fiduciary duties as well as the preliminary injunction granted by the bankruptcy court.

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[4] Crown now concedes that appellees Miller and Macek have standing. We address the issue of cross-appellant PACE's standing in Section III of this opinion.

II. Breach of Fiduciary Duties under ERISA

The parties do not dispute that the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, *see Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432–33 (9th Cir. 1986), and *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988), whereas the *implementation* of a decision to terminate is discretionary in nature and subject to ERISA's fiduciary obligations. *See Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342–44 (9th Cir. 1994). Crown does not challenge the bankruptcy court's finding that it failed fully to investtigate the PIUMPF merger option. Instead, Crown argues that both ERISA and the terms of the pension plan prohibit merger into a multiemployer plan as a means of termination; thus its decision to terminate, rather than to merge, was discretionary and not subject to fiduciary obligations. The merits of Miller and Macek's claim that Crown breached its fiduciary duties therefore turn on whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate.

A. Standard of Review

We review the bankruptcy court's decision directly and therefore review de novo the district court's decision on appeal from the bankruptcy court. *Cellular 101, Inc. v. Channel Communications, Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092, 1095 (9th Cir. 2004); *Neilson v. United States (In re Olshan)*, 356 F.3d 1078, 1083 (9th Cir. 2004). We apply the same standard of review applied by the district

court, and review the bankruptcy court's legal conclusions de novo, and its findings of fact for clear error. *Olshan*, 356 F.3d at 1083.

B. Permissibility of Merger under the Terms of the Pension Plan

Before the district court and in this appeal, Crown has argued that the terms of its pension plan do not permit a merger as a means of termination. Crown failed to raise this argument before the bankruptcy court. As a general rule, we do not consider issues argued for the first time on appeal. *Citibank (S.D.), W.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1085 n.2 (9th Cir. 1996). This rule applies to appeals from bankruptcy proceedings. *In re Southland Supply, Inc.*, 657 F.2d 1076, 1079 (9th Cir. 1981). We conclude that none of our recognized exceptions to this rule applies to this case. *Cf. Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004); Eashai, 87 F.3d at 1085 n.2. We therefore deem this argument waived.

C. Permissibility of Merger as a Means of Termination under ERISA

The bankruptcy court did not explicitly determine whether ERISA permits merger into a multi-employer plan as a means of terminating a single employer plan. Instead, the court assumed that this was permissible, finding "the decision whether to annuitize the plans or merge them into PIUMPF was . . . a discretionary act" subject to fiduciary duties. Because the bankruptcy court's interpretation of ERISA is a question of law, our review is de

novo. *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1178 (9th Cir. 2004); *Olshan*, 356 F.3d at 1083.

As Crown argues, ERISA § 4041(a)(1), 29 U.S.C. § 1341(a)(1), provides that the exclusive means of terminating a single-employer pension plan are: 1) institution of termination proceedings by the corporation under 29 U.S.C. § 1342; 2) standard termination under § 1341(b); and 3) distress termination under § 1341(c). The termination effected in this case was a standard termination. A standard termination requires that, "when the final distribution of assets occurs, the plan is sufficient for benefit liabilities." 29 U.S.C. § 1341(b)(1)(D). So long as the PBGC does not issue a notice of noncompliance, the plan administrator must distribute the assets. *Id.* § 1341(b)(2)(D); 29 C.F.R. §§ 4041.21(a), 4041.28(a), (c).

ERISA § 4041(b)(3), 29 U.S.C. § 1341(b)(3), sets forth the method for "final distribution of assets" for standard terminations. The assets are to be allocated according to the priorities listed in 29 U.S.C. § 1344. Next, the statutory section at issue in this case states:

> In distributing such assets, the plan administrator shall--
>
> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or*
>
> (ii) in accordance with the provisions of the plan and any applicable regu-

> lations, *otherwise fully provide all benefit liabilities under the plan.*

§ 1341(b)(3)(A) (emphasis added). Thus, ERISA explicitly provides for alternative means of terminating a pension plan. The implementing regulations are consistent:

> The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer *or in another permitted form.*

29 C.F.R. § 4041.28(c)(1) (emphasis added). Thus, the purchase of an irrevocable commitment from an insurer is not a requirement; other methods of termination are permitted as long as they are sufficient to cover plan liabilities.

Crown emphasizes that ERISA § 4041, 29 U.S.C. § 1341, and ERISA § 4232, 29 U.S.C. § 1412, which controls transfers between multiemployer and single-employer plans, are two "wholly separate sections of the statute," neither of which expressly permits mergers as a means of termination. Yet, as the district court persuasively reasoned, both 29 U.S.C. §§ 1341 and 1412 are included within ERISA Title IV, which covers the topic of "Plan Termination Insurance." Section 1412 falls under Subtitle E of Title IV, "Special Provisions for Multiemployer Plans." It would have been logical for Congress to place § 1412 within Title IV of ERISA because, as appellees Miller and Macek argue, one practical

effect of a merger or complete transfer is that at least one pension plan will cease to exist.

Crown cites *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 528–29, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947), and *Scarborough v. Office of Personnel Management*, 723 F.2d 801, 811 (11th Cir. 1984), for the proposition that a statute's titles and headings cannot "limit the plain meaning of the text." Those cases, however, dealt with *unambiguous* statutory language. By contrast, where the statutory language is *ambiguous*, titles and headings may be used to clarify the meaning of statutory text. *See Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1321 (9th Cir. 1990). Here, the statutory language is unclear: whether Congress intended to permit mergers into multiemployer plans as a means of termination under 29 U.S.C. § 1341(b)(3)(A) is uncertain. Consideration of the placement of titles and headings clarifies the statutory text and supports the conclusion that mergers are a permissible means of termination.

Crown also argues that 29 U.S.C. § 1412(f)(3), which involves transfers between or mergers of multiemployer and single-employer plans, supports its argument that terminations are distinct from transfers between single and multiemployer plans. Section 1412(f)(3) states:

> No transfer to which this section applies, in connection with a termination described in section 1341a(a)(2) of this title, shall be effective unless the transfer meets such

> requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

Section 1341a refers to terminations of multiemployer plans. The text of § 1412(f)(3) implies that a transfer between a single and multiemployer plan can be "in connection with a termination" (albeit the termination of a multiemployer plan). Thus, § 1412(f)(3) fails to support Crown's argument that termination and merger into a multiemployer plan are mutually-exclusive actions.

Finally, Crown argues that a merger into a multiemployer plan does not constitute a "distribution" under 29 U.S.C. § 1341(b)(3). The terms "distribution" or "distribute" are not expressly defined in either ERISA or its implementing regulations. See 29 U.S.C. §§ 1002, 1301; 29 C.F.R. § 4041.2. Dictionary definitions of "distribute" include: "to divide among several or many: deal out; apportion esp. to members of a group or over a period of time: allot"; "dispense, administer"; and "to give out or deliver esp. to the members of a group." WEBSTER'S THIRD NEW INT'L DICTIONARY (1993). These definitions do not support the exclusion of mergers into multiemployer plans as a means of termination. As appellees Miller and Macek argue, the purchase of irrevocable commitments from an insurer to provide all benefit liabilities under the plan, pursuant to 29 U.S.C. § 1341(b)(3), such as the annuity to be provided by Hartford Life in this case, does not appear to satisfy the distribution requirement any more than would a merger into a multiemployer plan. Both scenarios would involve a

series of payments to plan beneficiaries over time, rather than a lump-sum payment at the time of termination.

In sum, the text of ERISA § 4041 and its implementing regulations is ambiguous at best and neither explicitly nor implicitly prohibits merger into a multiemployer plan as a means of termination of a pension plan. As the district court determined, § 1341(b)(3) provides for alternative means of termination, so long as they are consistent with the plan provisions, applicable regulations and "otherwise fully provide all benefit liabilities under the plan." We hold that neither the statute nor its implementing regulations preclude mergers into multiemployer plans as a method of providing such benefit liabilities. We therefore affirm the district court's ruling on this issue.

D. Merits of Breach of Fiduciary Duty Claim

Applying the test for a preliminary injunction, the bankruptcy court found serious questions as to whether Crown breached its fiduciary duties to plan participants by failing fully to investigate the proposed PIUMPF merger. As previously noted, because the parties stipulated to having the bankruptcy court's findings of fact and conclusions of law deemed a final ruling on the merits, we review the merits determination de novo. *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 (9th Cir. 2002). Crown has never argued that it fairly considered the PIUMPF proposal, instead staking its defense on the argument that merger into

a multiemployer plan is an impermissible means of termination.

ERISA requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries" and for the exclusive purposes of "(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). ERISA's "exclusive benefit" rule provides that, except in certain circumstances,

> the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

§ 1103(c)(1); *Resolution Trust Corp. v. Fin. Insts. Ret. Fund*, 71 F.3d 1553, 1556–58 (10th Cir. 1995). Corporate officers and directors often "serve in a dual fiduciary capacity," with simultaneous duties running both to pensioners, in their capacity as plan trustees, and to shareholders, as directors of the corporation. *See Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 468–69 (9th Cir. 1994); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). Conflicts of interest created by these dual roles can lead to violations of ERISA's loyalty requirements. *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401–02 (9th Cir. 1995). We have stressed that where such conflicts arise, "decisions must be made with an eye single to the interests of the participants and beneficiaries." *Id.* at 1402 (quoting *Donovan*, 680

F.2d at 271). Furthermore, "fiduciaries may need to step aside, at least temporarily, from the management of assets where they face potentially conflicting interests." *Id.* at 1402 (quoting *Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984)); *see also Waller*, 32 F.3d at 1341–44 (holding that plaintiff stated an ERISA claim for breach of fiduciary duty where it alleged fiduciary imprudently based the choice of an annuity provider on the size of a potential reversion).

The bankruptcy court found "that there are serious questions whether the conduct of Crown's officers and Board of Directors was directed more at fulfilling their fiduciary obligations to the creditors of an insolvent corporation than at fulfilling their fiduciary obligations to the corporation's pensioners." The court applied the standard set forth in *Leigh*:

> Where it might be possible to question the fiduciaries' loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries.

727 F.2d at 125–26. The bankruptcy court determined that, whether motivated by the possibility of a reversion, Crown's "desperate financial circumstances," or the certainty of obtaining a release from the PBGC under an annuity option, Crown failed to make the requisite "intensive and scrupulous" investigation of investment options, including the proposed PIUMPF merger.

Crown's fiduciary obligation was to assure the payment of the promised defined benefits with as little risk of nonpayment as possible, not to use the fund's total assets to the beneficiaries' optimum benefit. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999) ("Since a decline in the value of a plan's assets does not alter accrued benefits, members similarly have no entitlement to share in a plan's surplus . . . ."); *cf. Collins v. Pension & Ins. Comm. of the S. Cal. Rock Prods. & Ready Mixed Concrete Ass'ns*, 144 F.3d 1279, 1282 (9th Cir. 1998) ("ERISA does not create an exclusive duty to maximize pecuniary benefits."). The bankruptcy court alluded to this limited obligation in stating that "had there been no prospect of a merger with another plan, then the Board's course of conduct almost surely would have passed muster." As the ERISA statute provides for reversions, *see* 29 U.S.C. § 1344, it can be permissible, depending on the governing plan's terms, for trustees to choose a termination option that provides for a reversion as long as the process employed is for the exclusive purpose of acting in the beneficiaries' interest. In making a decision among possible termination schemes, however, the reversion should not be taken into account, even to a minor extent, pursuant to the "eye single" principle of fiduciary responsibility to the beneficiaries. *See Pilkington*, 72 F.3d at 1401–02.

In *Pilkington*, plaintiffs alleged that pension trustees breached their fiduciary duty by choosing an annuity provider on the basis of the size of the potential reversion. *Id.* at 1401–02. Defendants

chose the lowest bidder, which resulted in the largest reversion, and the annuity provider defaulted shortly thereafter. *Id.* at 1397–98. In response to the defendants' argument that they chose an AAA or A+ rated annuity, we stated that "a mere ratings scan" does not satisfy a pension trustee's fiduciary duties. *Id.* at 1401. On the basis of "strong evidence that reversion maximization figured prominently" in the choice and that the trustees' "motivation may have deviated from that mandated by ERISA," we reversed a grant of summary judgment in favor of defendant trustees. *Id.*

As in *Pilkington*, the possibility of a reversion appears to have featured in the minds of the Crown trustees. The bankruptcy court, relying on *Pilkington*, stated that "the prospect of a reversion" was one of several possible factors that, individually or combined, "strongly suggests that the officers and directors of Crown did not make the 'intensive and scrupulous investigation of the plan's investment options' that the circumstances required particularly given their dual fiduciary capacity." The court concluded that "once the merger option was raised, the Board had a fiduciary duty to fully explore it and determine which option was truly in the beneficiaries' best interests. The fact that the company was out of cash and had a timetable for plan confirmation should have played no part in the determination.

We agree with the bankruptcy court that there is evidence that the fiduciaries' "motivation may have deviated" from the "eye single" focus on the interests of plan beneficiaries, as mandated by ERISA. *See id.*

at 1401–02 (quoting *Donovan*, 680 F.2d at 271). The risk to fund assets resulted from Crown's focus on an improper set of interests. *See Leigh*, 727 F.2d at 125 (stating that "under the section 404(a) duty of loyalty, the central question is whether the fiduciaries acted solely in the interests of the beneficiaries and for the exclusive purpose of providing them with benefits."). The bankruptcy court found evidence of divided loyalties and that Crown failed adequately to discharge its duties through thorough investigation. We conclude that the bankruptcy court did not err in determining that Crown breached its fiduciary duties by failing exclusively to prioritize the interests of plan participants and beneficiaries and failing to make the "intensive and scrupulous investigation of the plan's investment options." *See Leigh*, 727 F.2d at 125–26. We therefore affirm the district court's determination on this issue.

III. Standing

The district court held that PACE lacked standing on the ground that ERISA § 502(a), 29 U.S.C. § 1132(a), confers exclusive enforcement authority on plan participants, beneficiaries, fiduciaries, employers, states, and the Secretary of Labor. It further held that PACE lacked standing under ERISA § 4070, 29 U.S.C. § 1370(a), which confers standing on unions to enforce the termination procedures of ERISA, because its complaint did not allege that Crown violated the termination provisions of ERISA § 4041, 29 U.S.C.

§ 1341.[5] We review the district court's determination of standing de novo. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

On cross-appeal, PACE argues that, in light of liberal notice pleading rules, the district court should have construed its complaint broadly to include allegations that Crown violated the termination provisions of ERISA § 4041. Alternatively, PACE requests leave to amend its complaint to include such allegations.

Crown does not contest the district court's determination that plaintiffs Miller and Macek have standing. Crown contends that we need not address whether PACE has standing because the appeal will proceed regardless of whether PACE is a party. *See Sys. Council EM-3 v. AT&T Corp.*, 333 U.S. App. D.C. 63, 159 F.3d 1376, 1378–79 (D.C. Cir. 1998) (declining to decide whether union had standing to bring ERISA claims in light of plan beneficiaries'

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[5] Although Crown did not raise the issue of PACE's standing before the bankruptcy court, the district court addressed the issue on jurisdictional grounds, citing *Pershing Park Villas Homeowners Association v. United Pacific Insurance Company*, 219 F.3d 895, 899 (9th Cir. 2000) (noting that "because issues of constitutional standing are jurisdictional, they must be addressed whenever raised," whereas "objections to nonconstitutional standing not properly raised before the district court" may be waived), and *Curtis v. Nevada Bonding Corporation*, 53 F.3d 1023, 1027 (9th Cir. 1995) (reiterating that "a plaintiff's standing under [ ] § 1132(a)(1) is a prerequisite to ERISA jurisdiction.").

standing) (citing *Craig v. Boren*, 429 U.S. 190, 192–93, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976)). As an entity that collectively bargains for pension rights, however, PACE has institutional resources and experience to enforce ERISA, and it may be in a better position to protect the rights of all of its members. We conclude that, despite the fact that this litigation may proceed on the basis of Miller and Macek's standing, the presence or absence of PACE as a party remains a relevant issue.

Pursuant to ERISA § 4070, 29 U.S.C. § 1370, unions have standing to seek equitable relief for violations of ERISA §§ 4041, 4042, 4062–64, and 4069, 29 U.S.C. §§ 1341, 1342, 1362–64, 1369, which relate to termination procedures. The district court held that because PACE's complaint failed to state claims under ERISA §§ 4041, 4042, 4062–64, or 4069 for improper termination by Crown, and because the issue in this action is whether Crown breached its fiduciary duties, PACE did not have standing under § 4070.

PACE's first amended complaint did not explicitly allege violations of the termination procedures. Instead, it focused on Crown's breaches of fiduciary duty in failing adequately to consider the PIUMPF merger. PACE argues that there is a fiduciary duty overlay that permeates ERISA, and thus § 4070 provides a union with standing to enforce a breach of such duties in the context of plan termination. PACE requests that we grant it leave to amend its complaint to allege violations of ERISA's termination procedures, thus bringing it within the grant of standing for unions in § 4070. Because both parties

should have the opportunity to address this issue, we remand to the bankruptcy court so that it may consider in the first instance PACE's request to file an amended complaint and its new theory of standing. *See United Union of Roofers, Waterproofers and Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990) (remanding for determination of union's new theory of standing).

IV. Conclusion

We hold that merger into a multiemployer plan is a permissible means of terminating a pension plan under ERISA. We further hold that the bankruptcy court did not err in concluding that the Crown board breached its fiduciary duties by failing adequately to consider the PIUMPF merger and in order to prioritize the interests of plan participants and beneficiaries. We therefore affirm the district court's ruling on these issues. Finally, we vacate the district court's determination that PACE lacks standing, grant PACE's request for leave to amend its complaint to better articulate the basis for its standing, and remand the standing issue to the district court with instructions to remand to the bankruptcy court.[6]

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[6] The appellees/cross-appellant have submitted two requests for judicial notice in this court. In the first request, received on February 16, 2004, appellees/cross-appellant ask that we take judicial notice of Crown's motion for order authorizing the Liquidating Trustee to pay an adjustment premium to the Hartford Life

(continued...)

AFFIRMED in part; VACATED in part; and REMANDED.

Insurance Company, the bankruptcy court's order granting this motion, and appellees/cross-appellant's notice of appeal. In the second request, received on June 7, 2004, appellees/cross-appellant request that we take judicial notice of PACE's First Amended Petition to Compel Arbitration and Complaint for Breach of the Terms of Collective Bargaining Agreements, filed in the bankruptcy court on October 2, 2002, and the transcript of a January 22, 2003 petition to compel arbitration. Appellees/cross-appellant have not adequately explained why these documents are relevant or on what grounds this court should take judicial notice of them. We therefore deny these requests.

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellant,

v.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBER AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS;

EDWARD MILLER; JEFFREY D. MACEK,
ON BEHALF OF THEMSELVES
AND OTHERS SIMILARLY SITUATED,
Defendants-Appellees.

PACE INTERNATIONAL UNION, AFL-CIO,
CHEMICAL & ENERGY WORKERS INTERNATIONAL
UNION, ON BEHALF OF MEMBERS AND FORMER
MEMBER PARTICIPANTS IN PENSION PLANS,
Defendant-Appellant,

v.

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellee.

No. 03-15303, No. 03-15331

United States Court of Appeals
for the Ninth Circuit

146 Fed. Appx. 917

For JEFFREY H. BECK, Liquidating Trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company, Appellant: Stephen A. Kroft, Esq., Rodger M. Landau, McDERMOTT WILL & EMERY, LLP, Los Angeles, CA.

For PACE INTERNATIONAL UNION, on behalf of member and former member particpants in pension plans sponsored by the the Debtors, EDWARD MILLER, JEFFREY D. MACEK, on behalf of themselves and others similarly situated, Defendants - Appellees: Christian L. Raisner, Esq., John Plotz, Esq., WEINBERG, ROGER & ROSENFELD, Oakland, CA.

Before: REINHARDT, PAEZ, and BERZON, Circuit Judges.

MEMORANDUM*

In an opinion published today, we hold that the bankruptcy court did not err in concluding that the Crown board breached its fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001–1461,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

affirm the district court's ruling on this issue, and remand the issue of PACE's standing. Crown challenges the remedy imposed by the bankruptcy court. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we affirm.

Bankruptcy courts have broad authority to order appropriate equitable relief. *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 88, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991) ("The bankruptcy court retains its broad equitable power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code].") (internal quotation marks and citation omitted, second alteration in original). Moreover, ERISA § 502(a)(3) specifically recognizes that plan participants, beneficiaries or fiduciaries may obtain injunctive or "other appropriate equitable relief" to redress ERISA violations or to enforce ERISA provisions. 29 U.S.C. § 1132(a)(3). ERISA § 409 contains a "catchall" relief provision subjecting a fiduciary to personal liability for "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a); *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1414 (9th Cir. 1988) ("When a fiduciary has breached one of his statutorily defined duties to an ERISA plan, then the catchall relief provision of § 409(a) may be used to fashion a remedy that inures to the benefit of the plan as a whole.") (internal quotation marks and citation omitted). We review the bankruptcy court's choice of remedies for an abuse of discretion. *Bankr. Receivables Mgmt. v. Lopez, (In re Lopez)*, 345 F.3d

701, 705 (9th Cir. 2003), *cert. denied*, 541 U.S. 987, 158 L. Ed. 2d 491, 124 S. Ct. 2015 (2004).

Following the bankruptcy court's determination that Crown breached its fiduciary duties to plan participants and beneficiaries, the court issued a preliminary injunction ordering that Crown maintain the residual assets of the plan in an interest-bearing account pending a final decision on the allocation of the assets. Pursuant to the bankruptcy court's order, the parties submitted a joint report setting forth a procedure for distribution of the residual assets for the benefit of the plan participants. The bankruptcy court entered an order approving the distribution plan and left the preliminary injunction in effect pending implementation of the distribution.

Crown argues that by approving the distribution plan, the bankruptcy court improperly imposed a constructive trust over the residual assets of the plan. By the terms of its order, the bankruptcy court did not characterize the remedy it imposed as a constructive trust. Rather, having found a breach of fiduciary duties under ERISA, the bankruptcy court exercised its broad equitable power and approved a distribution of plan assets as set forth by the parties. Under all of the circumstances, we fail to see how the bankruptcy court abused its discretion in awarding this relief.

AFFIRMED.

App. 29

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC., AND CROWN PAPER COMPANY,
Appellant,

vs.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBERS AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS;

EDWARD J. MILLER, JEFFREY D. MACEK
ON BEHALF OF THEMSELVES
AND OTHERS SIMILARLY SITUATED,
Appellees.

No. C 02-1407 MHP

United States District Court
for the Northern District Of California

2003 U.S. Dist. LEXIS 2283
29 Employee Benefits Cas. (BNA) 2601

January 10, 2003, Decided
January 10, 2003, Filed

For Crown Vantage, Inc., Appellant: Judith Germano, Mary Warren, Shearman & Sterling, New York, NY. Roger M. Landau, McDermott, Will & Emery, Los Angeles, CA.

For Pace International Union, Appellee: Christian L. Raisner, Van Bourg, Weinberg, Roger & Rosenfeld, Oakland, CA.

MARILYN HALL PATEL, Chief Judge.

MEMORANDUM AND ORDER

Jeffrey H. Beck, the liquidating trustee of the estates of Crown Vantage, Inc. and Crown Paper Co. ("Crown"), appeals the bankruptcy court's order directing that Crown's prior employer contributions to the pension plans in excess of annuity costs, or a reversion, be held in an interest-bearing account.[1] The order was based on the bankruptcy court's holding that Crown breached the fiduciary duty owed to the pension plan participants under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C § 1001 et seq., by failing to consider an alternative to annuitizing the pension funds. Having considered the parties' arguments and submissions and for the reasons set forth below, the court rules as follows.

BACKGROUND

Crown filed Chapter 11 petitions in the bankruptcy court on March 15, 2000, which led to a

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[1] The bankruptcy court also directed the parties to investigate and report to the court on the feasibility of distributing the reversion to plan participants instead of the liquidating trustee for the benefits of Crown's creditors.

piecemeal liquidation of the companies' assets. The bankruptcy court found that as of June 2001 the sale proceeds was not even enough to cover the companies' secured liabilities. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates 025) (same as Vol. II, Tab 7, Bates No. 392). Crown had to wind down the operations and move to a Chapter 11 plan confirmation. Members of Crown's Board of Directors ("Crown's directors") were also the trustees for Crown's eighteen pension plans, including one for salaried employees and the rest for hourly rate employees.

Crown faced urgent issues regarding the pension plans. The Pension Benefit Guarantee Corporation ("PBGC") had filed Proofs of Claims in the millions if PBGC were forced to assume the liabilities for any of these eighteen plans. The bankruptcy court found PBGC's Proofs of Claims to be "a stumbling block to [Chapter 11] plan confirmation." Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 026). It was also unclear whether any of the plans had sufficient assets to meet plan liabilities through the purchase of an annuity and thus could be terminated. Crown therefore engaged Dietrich & Associates ("Dietrich") in July 2001 to obtain quotes from insurance companies for an annuity. Dietrich obtained preliminary bids for Crown starting on August 30, 2001, and Crown's Directors were surprised to find out that they were able to annuitize at least some of the pension plans. Tr. Hr'g, Nov. 29, 2001, (Excerpts of R. Vol. I, Tab 5, Bates Nos. 307–08). In order to purchase an annuity, Crown merged twelve of the seventeen hourly rate employee

pension plans into a Merged Plan. J. Report at 2, Feb. 12, 2002 (Excerpts of R., Vol. II, Tab 8).

During the summer of 2001, Pace International Union ("Union") suggested a possibility to merge Crown's seventeen union plans into the Pace Industrial Union Management Pension Fund ("PIUMPF"), a multi-employer pension fund for members of the Union. The bankruptcy court found that this merger would be superior to standard termination in two ways. First, the retirees might received more than the minimum benefits under the merged plans because PIUMPF had occasionally paid pensioneers a thirteenth monthly check during the year. Second, the employees could resort to an established dispute resolution program under the merged plans. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol.1, Tab 2, Bates No. 027).

However, the bankruptcy court found that Crown's directors never seriously considered the merger proposal. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 031–033). Crown's directors were never presented any document pertinent to the proposed merger on or before October 9, 2001. Nor did they request an analysis of the PIUMPF offer and thereby compare the risks and benefits of the PIUMPF merger with annuitization. One of Crown's directors testified that the merger was never a viable alternative to annuitization because PIUMPF is a multi-employer plan in a weak industry. The only indication that the directors considered the merger proposal is a statement in the minutes of the October 9, 2001 board meeting that PBGC allegedly had reservation about a merger with

PIUMPF and therefore might not release Crown for a Chapter 11 confirmation. But the bankruptcy court found no evidence that Crown's attorneys pursued a release from PBGC under the proposed merger and cited rebuttal evidence that a PBGC attorney involved in Crown's pension plan matters never stated any reservations or concerns about a merger with PIUMPF. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 032).

Instead, Crown's directors decided on October 9, 2001 to accept the bid which would have expired within twenty-four hours from Hartford Life Insurance Company, an insurance company qualified as an annuitant based on Dietrich's analysis. Crown signed an agreement the next day to deposit with Hartford over eighty four million dollars from the Merged Plan assets. After the payment of the annuity premium, approximately five million dollar in assets remained in the Merged Plan. The bankruptcy court found no evidence suggesting that Crown's directors sought an extension or waiver of the twenty-four hour deadline. However, Dietrich's president, Robert Schaefer, testified that such bids from potential annuitants were usually good for only one day because of the volatile nature of the investment market. Tr. Hr'g, Nov. 29, 2001 (Excerpts of Record, Vol. I, Tab 5, Bates No. 232).

The bankruptcy court found that Crown had determined to annuitize the pension plans perhaps as early as when preliminary annuity bids were submitted on August 30, 2001 and failed to consider the PIUMPF merger proposal seriously. Tr. Hr'g,

Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates Nos. 032–033). The bankruptcy further held that the decision whether to annuitize the plans or merge them into PIUMPF was a discretionary act subject to fiduciary responsibilities as mandated by ERISA and the case law. Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. I, Tab 2, Bates No. 036). Finding evidence that Crown was motivated to choose annuitization instead of merger by factors other than the pension plan participants' best interests, the bankruptcy court held that Crown's officers and directors breached their fiduciary duty under ERISA and consequently granted a preliminary injunction against Crown. Instead of attempting to undo the annuitization by Hartford, the bankruptcy court ordered that any reversion paid by the insurer be placed into an interest-bearing account as a constructive trust pending a final decision. The parties were also directed to investigate and then report to the court on the feasibility of investing this reversion into one or more pension plans. Before the court now is Crown's appeal from this preliminary injunction. The appellees ("Pace") include the Union, on behalf of members and former member participants sponsored by Crown, a Edward J. Miller and a Jeffrey D. Macek on behalf of themselves and others similarly situated.

LEGAL STANDARD

The court reviews the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. See *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995). A factual finding is clearly erroneous if the appellate court, after

reviewing the record, has a definite conviction that a mistake has been made. *Beauchamp v. Hoose (In re Beauchamp)*, 236 B.R. 727, 729 (B.A.P. 9th Cir. 1999). Findings of fact based on credibility are given particular deference by reviewing courts. *Id.* at 730. Mixed questions of fact and law are reviewed de novo. *Id.*

DISCUSSION

There are two main issues on appeal. First, Crown argues, for the first time, that none of the appellees has standing to bring this action. Second, Crown argues that no fiduciary duty under ERISA was implicated when Crown's Directors decided to annuitize the pension plans at issue instead of merging them into PIUMPF. Standing, as a threshold issue, is addressed first.

I. Standing

Crown appears to be arguing that the appellees lack both constitutional standing and a statutory cause of action to prosecute the claims under ERISA. Because the purchase of an annuity did not result in any loss recognized by ERISA to the pension plans at issue, Crown contends that none of the appellees possesses standing to assert a claim for breach of fiduciary duty under ERISA. Crown further argues that the Union is not an enumerated party under ERISA and therefore has no standing to enforce ERISA. 29 U.S.C. § 1132(a) (empowering participants, beneficiaries or fiduciaries to bring a civil action to enforce ERISA benefit rights under Subchapter I of ERISA, 29 U.S.C. §§ 1001–1191).

Finally, Crown argues that Miller and Macek, the other appellees, do not have standing because they not participants in all the pension plans at issue.

Although appellees' standing was never raised before the bankruptcy court, the court may not waive this issue in the present action. "Constitutional standing concerns whether the plaintiffs stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III [of the Constitution]," the issues of which are "jurisdictional" and therefore "must be addressed whenever raised." *Pershing Park Villas Homeowners Ass'n. v. United Pacific Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000). Further, the Ninth Circuit has repeatedly held that "a plaintiffs standing under section 1132(a)(1) is a prerequisite to ERISA jurisdiction." *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1026–27 (9th Cir. 1995) (citing three other Ninth Circuit decisions to support the holding that "federal courts lack subject matter jurisdiction if the plaintiff in an action for benefits owed under an ERISA plan lacks standing to bring a civil suit enforcing ERISA under 29 U.S.C. § 1132(a)(1)(B)"). *See also Local 159, 342, 343 & 344 v. Nor-Cal Plumbing, Inc.*, 185 F.3d, 978, 981 (9th Cir. 1999). Therefore, the issues of standing under the statute as well as issues of constitutional standing cannot be waived and the court must address them on appeal. *Cf. United Pacific Ins.*, 219 F.3d at 899 (distinguishing constitutional standing and prudential standing and finding that the issues of nonconstitutional standing not properly raised before the district court are waived).

A. PACE International Union

Many courts have found that the list of entities empowered by section 1132(a) is exclusive. 29 U.S.C. § 1132(a). For example, the Third Circuit stated: "It is clear from the statute that labor unions are neither participants nor beneficiaries, and consequently plaintiff does not fall within the provision." *New Jersey State AFL-CIO v. New Jersey*, 747 F.2d 891, 893 (3d Cir. 1984). The D.C. Circuit affirmed a lower court's findings that "under the plain language of the statute, the Union Plaintiffs do not have standing to bring an ERISA action" and the union standing issue under ERISA was distinct from constitutional standing issues implicated by an association's bringing actions on behalf of its members. *Systems Control EM-3 v. AT&T Corp.*, 972 F. Supp. 21, 27 (D.D.C. 1997), *aff'd*, 333 U.S. App. D.C. 63, 159 F.3d 1376 (D.C. Cir. 1998). The Six Circuit also affirmed a district court's holdings that "the Union, simply by virtue of its status as a labor union, does not fall within those who are designated by the statute as capable of bringing an ERISA action," that although "an ERISA claim may derive from a collective bargaining agreement negotiated by a union, Congress has obviously chosen not to include a labor union as an appropriate party to vindicate employees' rights under ERISA." *International Union v. Auto Glass Employees Fed. Credit Union*, 858 F. Supp. 711, 721–22 (M.D. Tenn. 1994), *aff'd*, 72 F.3d 1243 (6th Cir. 1996). See also, *Communications Workers of Am. v. SBC Disability Income Plan*, 80 F. Supp.2d 631 (W.D. Tex. 1999) (discussing many cases where

courts found the list of empowered entities under section 1132(a) to be exclusive and dismissing the union plaintiff); *United Food & Commercial Workers Local 204 v. Harris-Teeter Super Markets. Inc.*, 716 F. Supp. 1551, 1561 (W.D.N.C. 1989) (holding that the union lacks standing as a plaintiff under section 1132(a)). Therefore, unions, which are neither participants nor beneficiaries, do not possess standing to bring a civil action under section 1132. 29 U.S.C. § 1132 (civil enforcement of ERISA benefits and rights as afforded by Subchapter I of ERISA governing the protection of employee benefit rights, 29 U.S.C. §§ 1001–1191, and separate from Subchapter III of ERISA governing the plan termination insurance, 29 U.S.C. §§ 1301–1461).[2]

Although Pace attempts to argue that the Ninth Circuit's answer to this issue might be different, the court is not convinced. Crown correctly pointed out the defects in Pace's reasoning: the Ninth Circuit case cited by Pace relied on the faulty analysis in *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982), that "ERISA § 502(a) [29 U.S.C. § 1132(a)] does not provide an exhaustive list of eligible plaintiffs." *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861

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[2] Crown correctly states that only the "enumerated entities [in section 1132(a)] may bring civil actions based upon breach of fiduciary duty." Appellant's Br., at 19:27-19:28. As Pace conceded, although in a footnote, "most courts which have considered the issue have held that unions do not have standing to assert the ERISA claims of their members." Appellees Br., at 21, n.7.

F.2d 1406, 1410, n.6 (9th Cir. 1988). In fact, the Ninth Circuit noted that Fentron "has been twice repudiated by the Supreme Court." *Cripps v. Life Ins. of North Am.*, 980 F.2d 1261, 1265 (9th Cir. 1992). Cripps discussed *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 145–47, 87 L. Ed. 2d 96, 105 S. Ct. 3085, 3092 (1985), which held that section 1132 contains comprehensive and "carefully integrated" enforcement provisions demonstrating Congress's intention not to authorize other remedies not provided for in the statute. *Cripps*, 980 F.2d at 1265. Cripps further relied on *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983), which held that "ERISA carefully enumerates the parties entitled to seek relief under § 502 [29 U.S.C. § 1132]" and does not empower anyone other than the listed entities to assert ERISA claims. *Cripps*, 980 F.2d at 1265. The Supreme Court reinforced its holdings during the last term, noting that "ERISA's 'carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 151 L. Ed. 2d 635, 122 S. Ct. 708, 712 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 254, 124 L. Ed. 2d 161, 113 S. Ct. 2063, 2067 (1993)) (emphasis in original) (citations omitted). Because section 1132 provides an exclusive list of those who can assert ERISA claims to enforce employee benefit rights, this court was convinced that "if the Ninth Circuit is confronted with the issue of whether an employer can bring suit to enforce claims against an ERISA

fiduciary it will fully overturn Fentron." *Tool v. National Employee Benefit Servs.*, 957 F. Supp. 1114, 1117 (N.D. Cal. 1996). The same rationale applies with equal force in the present action and therefore the Union does not have standing under section 1132 to sue Crown for breach of ERISA fiduciary duties.[3]

Pace argues that section 4070 of ERISA, 29 U.S.C. § 1370, explicitly provides the Union standing to bring this action. This argument is premised on Pace's assertion that "the present suit concerns improper termination of a plan under section 1341." However, improper termination in violation of section 1341 is not at issue in the present action. See 29 U.S.C. § 1341. First, until the reply brief on appeal, Pace never asserted any violation by Crown under section 1341. The First Amended Complaint filed on November 19, 2001, the operative pleading in the present action, only alleged ERISA jurisdiction under sections 1132 (a)(2) and (e)(1). First Am. Compl. (Excerpts of R., Vol I. Tab 4, Bates No. 062). More importantly, the issue in this action is whether Crown's directors breached their fiduciary obligations to the pension plan participants and beneficiaries in choosing a termination by annuitization over a merger with PIUMPF, even when the termination in and of itself fully complies

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[3] Accordingly, it is not necessary to address the issue whether the alleged lack of financial harm to the pension plans would deprive the Union of standing under ERISA.

with section 1341.[4] See 29 U.S.C. § 1104 (on fiduciary obligations); 29 U.S.C § 1341 (on termination).

B. Miller & Macek

Crown first argues that none of the appellees has standing under ERISA because the annuity policy would satisfy all the accrued benefits afforded by the pensions plans at issue. The court is not convinced that the authority cited by Crown applies to the present action where the reversion, arguably surplus of the pension plans, was generated by the plan fiduciaries' questionable act that may have constituted a breach of the duty of loyalty. Crown relies on Hughes Aircraft Co. v. Jacobson, which held that participants in defined benefit pension plans have "a nonforfeitable right only to their 'accrued benefit'" and "no entitlement to share in a plan's surplus." 525 U.S. 432, 439, 142 L. Ed. 2d 881, 119 S. Ct. 755, 761 (1999). However, in Jacobson, the company "did not use the surplus for its own benefit."[5] *Id.* Further, there was no issue of

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[4] The bankruptcy court stated: "Had there been no prospect of a merger with another plan, then the Board's court of conduct in choosing Hartford almost surely would have passed muster." TR. Hr. Dec. 11, 2001, Excerpts of Record, Vol. I, Tab 2, Bates No. 035.

[5] As addressed in the next section, the most dispositive fiduciary obligation implicated in the present action is the duty of loyalty. Using surplus to the fiduciary's own benefit certainly raises the issue of loyalty. This appears to be the driving force behind the bankruptcy court's decision: Crown had dual fiduciary obligations to the

(continued...)

fiduciary duties, "because ERISA's fiduciary provisions are inapplicable to the amendments [by Hughes to the benefit plans]." *Id.* at 443. Crown further cites Harley v. Minnesota Mining & Mfg. Co., which relied on Jacobson to dismiss ERISA claims that the pension plan fiduciaries failed to investigate and monitor the investment using the pension fund assets when the defined benefit plan at issue had a substantial surplus. 284 F.3d 901, 906 (8th Cir. 2002) (citing *Jacobson*, 525 U.S. at 440, that a "loss to Plan surplus is a loss only to . . . the plan's sponsor"). However, Harley also did not involve a breach in duty of loyalty because: the plan fiduciaries did not use the surplus for their own benefits. *Id.*

Further, Jacobson and Harley do not purport to overturn decisions such as *Waller v. Blue Cross of California*, 32 F.3d 1337, 1339 (9th Cir. 1994). Waller found that the pension plan participants "have standing to pursue the equitable remedy of a constructive trust to distribute defendants' allegedly ill-gotten profits [by a bidding process geared solely toward selecting an annuity policy that would enable

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creditors of an insolvent corporation as well as to the pension plan participants. In electing to terminate the pension plans by, annuitization as motivated by the prospect of a reversion interest beneficial to the creditors while failing to investigate an alternative which may better serve the pension plan participants' interests, Crown breached the duty of loyalty as the fiduciaries of the pension plans.

defendants to obtain the maximum reversion possible] to the former participants and beneficiaries of the plan." *Id.* Crown's interpretation of Jacobson and Harley also contradicts Leigh v. Engle, which held that "ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss." 727 F.2d 113, 121–22 (7th Cir. 1984) (quoting section 1109(a), 29 U.S.C. § 1109(a), to support the holding that "[a] fiduciary who breaches his duties "shall be personally liable . . . to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"). In Waller and Leigh, the participants suffered no financial harm to their accrued benefits. However, the plan fiduciaries did not act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). Therefore, even if Hartford's annuity policy would satisfy all accrued benefits under the pension plans in question, the plan participants can assert ERISA claims against the fiduciaries when the plan assets were used to purchase the annuity in order to generate a reversion that serves an interest in conflict with that of the plan participants.

Crown then argues that Miller and Macek cannot represent the participants in the eight plans that Miller and Macek did not originally belong to because of the uncertainty about which original plans the reversion of approximately five million dollars was attributable to. Miller and Macek (and other similarly situated) were participants of four pension plans, Plan No. 1-1, Frozen Plan No. 1-1,

Adams Plan and Frozen Adams Plan. Appellee's Br., at 22:8–22:9. These four plans together with seven other plans were merged into Plan No. 7 to form the Merged Plan, which was terminated under the standard termination procedure. Appellee's Supp. Excerpts of R., Tab 14. Therefore, Miller and Macek were participants of the Merged Plan. Accordingly, they can represent other participants in the Merged Plan, which would include the participants in all twelve original plans. As plan participants, they are clearly an enumerated party, under ERISA and therefore entitled to enforce the fiduciary obligations of the plan administrator for the Merged Plan[6] pursuant to section 1104. 29 U.S.C. § 1132 (on civil enforcement); 29 U.S.C. § 1104 (on fiduciary obligetions). Crown's argument that the reversion might be attributable to plans other than Miller and Macek's original four plans is unrelated to the standing issue. Rather, it would only become relevant if and when the parties determined that it was feasible to re-invest the reversion into the pension plans at issue.[7] This goes solely to the equitable remedy that may be fashioned. Miller and Macek can assert claims of the Merged Plan. The claims

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[6] It is undisputed that Crown's Directors remained as the plan administrator for the Merged Plan.

[7] In this aspect, therefore, the bankruptcy court's order of establishing a constructive trust for the five million-dollar reversion and requesting parties' investigation and report on the feasibility of re-investing the reversion into one or more of the pension plans is proper.

are the Plan's, not the individual plaintiff participant's.

II. Breach of Fiduciary Duty

Crown also argues that Crown's directors did not owe a fiduciary duty to the plan participants and beneficiaries choosing an annuity policy to terminate the plans was a business decision. And even if a merger with PIUMPF is an alternative method to terminate the plans, Crown's Directors were not allowed to do so under the terms of the pension plans. Crown further argues that the directors did not breach their fiduciary duty in choosing Hartford instead of other insurance carriers, which is not disputed by the appellees.[8]

The parties agree that Crown's decision to terminate the pension plans, as a business decision, did not raise any issues of fiduciary obligations under ERISA. They dispute, however, whether the decision to choose the Hartford annuity policy over a merger with PIUMPF was shielded by the business judgment rule. Crown argues that a merger with PIUMPF is an alternative to a decision to terminate rather than an alternative way of terminating the plans. The bankruptcy court, however, found that the merger was an alternative way of implementing

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[8] See *supra* note 3 (The bankruptcy court did not find Crown's choosing Hartford over other annuitants questionable.) Pace does not argue otherwise on appeal.

the decision to terminate and therefore not a business decision.[9]

Crown contends that ERISA does not envision termination by merger. The argument, however, is not persuasive. Section 1341 and section 1412 govern standard termination of a single employer pension plan and transfers between a multi-employer plan and a single employer plan, respectively. 29 U.S.C. §§ 1341, 1412. Nevertheless, Crown fails to note that both sections are in the same Subchapter III of ERISA entitled "Plan Termination Insurance." More importantly, the plain statutory language governing standard termination demonstrates that a merger in addition to annuitization can be a method of implementing the termination procedure. Section 1341(b)(3) states: "In distributing [plan] assets [pursuant to the standard termination of the plan under this subsection], the plan administrator shall (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or (ii) in according with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." 29 U.S.C.

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[9] The bankruptcy court stated: "Although the decision to terminate a plan is a business decision, both ERISA and the case law impose fiduciary responsibilities as to discretionary actions taken to implement that decision. . . . The decision whether to annuitize the plans or merge them in for PIUMPF was such a discretionary act." Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. II, Tab 7, Bates No. 403).

§ 1341(b)(3). Therefore, a plan administrator can implement a merger to terminate a plan, if the merger can cover all benefit liabilities under the plan and complies with the terms of the plan and "any applicable regulations."

Crown further argues that a merger with PIUMPF is not allowed under the terms of the pension plans at issue. The pertinent terms provide that any distributions on termination from the pension fund "may be effectuated in the discretion of the plan administrator by the purchase of nontransferable annuities, or by continuing the Retirement Fund in existence, or by a cash settlement with any Member with the Member's consent." § 12.4, Excerpts of R. Vol. I, Tab 9, Bates No. 386. Crown maintains that a merger with PIUMPF would contradict these terms and constitute breach of ERISA duties. But these terms should not be interpreted as exclusive. The next section in the term sheet concerns "merger or consolidation of the Plan with, or the transfer of assets and liabilities of the Plan to, any other employee benefit plan." § 12.5, Excerpts of R. Vol. I, Tab 9, Bates No. 386. This section also provides that "each Member in the Plan will (if the Plan had then terminated) receive a benefit immediately after the merger, consolidation or transfer. . . ." § 12.5, Excerpts of R. Vol. I, Tab 9, Bates No. 386. Clearly the merged plan can be a terminated one, and vice versa. Therefore, the plan terms do not bar a merger with PIUMPF.

Accordingly, the bankruptcy court did not err in finding that a merger with PIUMPF is an

alternative way to implement the business decision to terminate the plans. Crown does not dispute that the acts of implementing the termination procedure are subject to the scrutiny under ERISA's sections governing the plan administrator's fiduciary obligations.[10] Neither does Crown dispute the bankruptcy court's finding that "the officers and directors of Crown did not make the intensive and scrupulous investigation of the plan's investment options that the circumstances required particularly given their dual fiduciary capacity."[11] Tr. Hr'g, Dec. 11, 2001 (Excerpts of R., Vol. II, Tab 7, Bates No. 402) (internal quotations omitted). Therefore, the bankruptcy court was correct in holding that Crown's Directors, failing to consider the merger option seriously while acting as the plan administrator, breached the fiduciary duties under ERISA.

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[10] Crown states: "The fiduciary standard described in *Leigh v. Engle* is a standard applicable to plan administrators' actions, not plan sponsors' actions." Because the bankruptcy court is correct in finding that a merger with PIUMPF is an alternative method to implement the termination procedure, Crown's Directors acted as the plan administrator, rather than the plan sponsor. Therefore, the bankruptcy court's reliance on *Leigh*, 727 F.2d 123, is appropriate.

[11] It is immaterial that a termination by annuitization or a merger with PIUMPF can be characterized as "investment options." The bottom line is whether, how and for what purposes the pension plan assets have been used.

As a last resort, Crown argues that, even if the officers and directors breached their fiduciary duties, a constructive trust for the reversion is not a proper remedy. This argument is based on the assertions that Crown did not profit from the alleged wrongdoing or risk the trust assets. *Cf. Murdock*, 861 F.2d 1406 ("If ERISA fiduciaries breach their duties by risking trust assets for their own purposes, beneficiaries may recover the fiduciaries' profits made my misuse of the plan's assets."). However, the court is not persuaded that Murdock is only applicable to monetary profits made by fiduciaries with plan assets. Although the reversion would most likely inure to the benefit of Crown's administrative and priority creditors, it is also beneficial to Crown to discharge the fiduciary obligations owed to these creditors.[12] Further, the dispositive factor in Murdock was the self-serving purpose of using plan assets rather than the actual risk of such a use. *See id.* at 1414 ("In the case before us, the fiduciaries allegedly breached one of the duties to an employee benefit plan that lies at the core of ERISA-the duty of loyalty.") Contrary to Crown's interpretation, Waller also did not focus on the risks involved in choosing an unstable annuity provider. 32 F.3d 1337. Rather, the rationale underlying Waller was that the fiduciaries chose the lowest annuity bid in order to motivated by interests other than that of the plan participants and beneficiaries and used the plan assets for an annuity

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[12] This is exactly where the bankruptcy court found conflict of interests against the plan participants and beneficiaries. See *supra* note 4.

policy that generated the reversion for such interests.[13] Murdock and Waller applies. Accordingly, the constructive trust as ordered by the bankruptcy court is a proper remedy.

CONCLUSION

For the foregoing reasons, the court hereby AFFIRMS the preliminary injunction as issued by the bankruptcy court. The court further ORDERS that Pace International Union is DISMISSED from the present action.

IT IS SO ORDERED.

Date: January 10, 2003

MARILYN HALL PATEL

Chief Judge

United States District Court

Northern District of California

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[13] The appellees asserted some directors filed claims in the bankruptcy proceedings. First Am. Compl. Therefore, the self-interests may not only be in discharging the fiduciaries obligations to the creditors but also getting money back for these directors themselves.

IN RE: CROWN VANTAGE, CROWN PAPER, INC.
Debtors.

Case No. 00-41584 N; 00-41583 N

PACE INTERNATIONAL UNION,
Plaintiff

v.

CROWN VANTAGE, CROWN PAPER COMPANY, ET AL,
Defendants.

A. P. No. 01-4375 AN

United States Bankruptcy Court
Northern District of California
(Oakland Division)

TRANSCRIPT OF PROCEEDINGS
HEARING RE TRO, PRELIMINARY INJUNCTION
TELEPHONIC CONFERENCE

BEFORE THE HONORABLE RANDALL J. NEWSOME
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors/ Defendants:

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- AND -
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PROCEEDINGS

December 11, 2001 3:01 p.m.

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THE COURT: Good evening, who do we have on the line?

MS. WARREN: Good evening. Judge, it's Mary Warren representing the Defendants in the Pace matter, and also Judith Germano of Shearman & Sterling is with me as well.

MR. RAISNER: Christian Raisner, Your Honor, for the Plaintiff and John Plotz, except for some reason the conferencing did not work.

THE COURT: Okay. Well, the first question, or the first issue I think I need to take up is as to the supplemental evidence that was submitted yesterday. Mr. Raisner, I'm not going to allow that in, first because it wasn't presented at the trial, but more importantly, I don't know that it's really relevant.

The second issue I want to take up, which I should have taken up some time ago but for some reason failed to mention, Rule 65(a)(2) of the Federal Rules of Civil Procedure which I believe are incorporated into 7065 of the Bankruptcy Rules allows the Court to consolidate the hearing on the preliminary injunction with the merits. I don't think there's any way that I could do that on my own at this point, but I wondered whether or not the parties would stipulate to that.

MS. WARREN: We would stipulate, Your Honor.

MR. RAISNER: Well, Your Honor, we believe that there may be issues as to the merits that we would need to discover further facts. So if we were dealing with all of the merits, I guess I would certainly have to consult more specifically before I stipulated to that.

THE COURT: Well, as to the entitlement to a preliminary injunction, at any rate, rather than --

MR. RAISNER: Certainly as to the entitlement to a preliminary injunction for those purposes, we're willing to stipulate.

THE COURT: To this being also consolidated on the merits of the substantive issue; is that right?

Well, look, I sprung this on you, and it's probably not fair for me to require that. Why don't I just issue the decision that I have here and then you can decide what, if anything, you should do going forward. So I will do that unless anyone has anything else to say at this point.

(No response.)

All right. Then I'll proceed.

This Chapter 11 adversary proceeding is before the Court upon the Plaintiff's motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure as incorporated into Bankruptcy Rule 7065. The Plaintiff's complaint alleges, among other things, that the Defendants committed breaches of their fiduciary duties in terminating certain company pension plans.

The facts surrounding these claims are as follows:

Crown Vantage, Inc. is the parent company of Crown Paper, Inc., a specialty paper company spun off from James River Paper in 1995 when James River merged with Fort Howard Paper to become

Fort James. Subsequently, Fort James was acquired by Georgia Pacific.

Crown employed some twenty-six hundred people and operated seven paper mills in the Eastern United States. As a result of weak market prices for paper and over-leveraging of its aged assets, Crown began losing money almost immediately after the spin-off and continued to lose money thereafter.

Crown Vantage and Crown Paper filed Chapter 11 petitions on March 15, 2000. Finding it impossible to reorganize as a going concern due to unmitigated losses, the Debtors embarked upon a piecemeal liquidation of their assets. At least by the time the last of the paper mills was sold in June of 2001 and probably long before then, it was clear to everyone involved in the case that the sale proceeds would not come close to paying the secured and unsecured liabilities of these companies. Indeed, the companies' secured lenders were under secured by tens of millions of dollars.

Even after agreeing to relinquish as much as 21 million dollars towards winding up the Debtors' affairs through a liquidating Chapter 11 Plan, it is unclear whether there will be sufficient funds to pay the administrative expense claimants. It is almost a certainty that the unsecured creditors in these cases will receive nothing unless the Debtors' fraudulent transfer lawsuit against their former parent is successful.

With cash running out and secured lenders unwilling to release any further funds, absent the confirmation of a Chapter 11 Plan, the pressure was on to wind down the company's remaining operations and move towards plan confirmation. There was particular urgency in addressing the termination of Crown's 18 pension plans, 17 of which were for hourly rate employees and the remaining one for salaried employees.

Members of Crown's Board of Directors were also the trustees for these pension plans. The Pension Benefit Guarantee Corporation had filed Proofs of Claim totaling in the millions for any funding liability they would be forced to assume if they took over any of these plans. These Proofs of Claim potentially posed a stumbling block to plan confirmation.

As of June 2001, it was unclear whether some or all of the plans were susceptible to what is known as a standard termination; i.e., when plan assets are sufficient to meet plan liabilities through the purchase of an annuity. In July of 2001, Crown engaged Dietrich (Phonetic) & Associates to act as their agent to obtain quotes from insurance companies for the purchase of such an annuity. Dietrich is only one of a handful of firms in the country which performs this service.

According to Robert Schaefer, (Phonetic) president of Dietrich, the sole purpose of his firm's retention was to seek out an annuity agreement. See Plaintiff's Exhibit 7. It was his understanding as of his firm's retention on July 23, 2001 that

Crown had definitely decided to pursue this avenue for terminating the plans. Dietrich's services were to paid by the insurance company from which Crown purchased the annuity. Had Crown's intention been otherwise than to purchase an annuity, Schaefer would have structured his retention agreement differently.

Some time during the summer of 2001, the possibility was raised that 17 Crown Union plans might be merged into the Pace Industrial Union Management Pension Fund or PIUMPF, a Taft Hartley Multi-Employer Pension Fund for members of Pace International Union. At that time, both Pace and Crown viewed such a merger as advantageous. At that point, it wasn't at all clear to Crown that the plans had adequate assets to allow standard termination. From the Union's standpoint, the merger held out the prospect that retirees might receive more than the minimum benefits under the plans since PIUMPF had occasionally in the past paid pensioners a thirteenth monthly check during the year.

The plans also contain an established dispute resolution program which employees could resort to if problems arose. On August 15th, 2001, Fredrick Sosnick and Robert Cicero of Shearmn & Sterling, Debtors' counsel, Evan Davis, General Counsel of Crown, and Robert E. Smith, vice-president of Pace Region Four met in Richmond Virginia to discuss the possibility of such a merger.

The Crown representatives expressed only two concerns. They wanted to be assured of the financial

soundness of PIUMPF and that such a merger was legally possible. The parties agreed that their attorneys and actuaries would further investigate the merger. For a variety of reasons, there was some delay in exchanging the required information and in putting together a merger proposal. But on September 26th 2001, the Segal (Phonetic) companies, PIUMPF's actuary, reported that a merger of the Union plans in question was feasible.

Although Crown asserts that the merger with PIUMPF was never feasible because PIUMPF was not financially sound, there is insufficient evidence in the record to support this assertion. PIUMPF's 2001 report lists unfunded actuarial accrued liabilities of $239,140,452, but Virginia McGinley (Phonetic), vice-president of Segal Company and signing actuary for PIUMPF testified that the plan was well funded and exceeded the minimum requirements by law.

Lawrence Reed (Phonetic) of Watson Wyatt, actuaries for Crown, testified that there was no one correct method for determining the financial soundness of the fund and that it did not have, sufficient information to state that PIUMPF was under funded. On September 26th, Robert Cicero wrote to Sleavin & Hart (Phonetic), PIUMPF's lawyers, requesting, quote:'

> "... additional information to complete its diligence review."

End quote. Plaintiff's Exhibit 23.

That same day, Crown's Board of Directors met and reviewed preliminary bids for annuitizing the plans. Those bids were submitted to the company on or about August the 30th. According to Board member, Donna Weaver, it was then that the Board first learned that the Union plans, although not the salaried workers plans, could be annuitized. The circumstances strongly suggest and the Court hereby finds that it was at this meeting, if not sooner, that the Board also learned that an annuitization of the plans might well result in Crown receiving a reversion from the plans.

The minutes from that meeting read as follows:

> The Union has offered to take all of the hourly pension plans into PIUMPF, the Union Multi-employer Plan. This offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers. The final bids are anticipated on October 9th, 2001." Plaintiff's Exhibit 9.

On October 1, 2001, Sleavin & Hart sent Robert Cicero a draft of a proposed merger agreement. Plaintiff's Exhibit 25. On October 4, 2001, the Court conducted a hearing on approval of Crown's disclosure statement. At that hearing, Mr. John Plotz representing Pace raised concerns about the lack of detail in the Disclosure Statement regarding the termination of the pension plans.

Noting that the matter was in flux, Mr. Sosnick responded that, quote:

> "One of the things we're looking to do is not in fact terminate the plans which may have some adverse consequences to the participants, but to try to merge them into the Union plan which we think would benefit them."

End quote. Transcript, October 4th hearing, page 14.

At the Court's suggestion, the parties then agreed that the Disclosure Statement should be amended to state that Crown, quote:

> "...must comply with the Bankruptcy Code, the provisions of the pension plan, all other applicable Federal and State law, subject to determination for compliance purposes of the Bankruptcy Court."

End quote. Transcript October 4th hearing, page 15.

On October 8th, Hart & Sleavin sent Cicero the documents he requested on September the 26th. On October the 9th, the Crown Board of Directors met again. According to Ms. Weaver, at that point, the Board was on a 45-day timetable to dissolve the company which was down to its last $10,000 or less in the bank.

The Board was presented with final bids from Fohr & Schirs (Phonetic). Either at that meeting or some time before, the Board was informed that the final bids would expire within 24 hours requiring Board action that afternoon. The Board chose a bid

from Hartford Life Insurance Company to annuitize 12 of the Union plans. The other five plans would remain the responsibility of Georgia Pacific pursuant to prior agreement.

The stated reasons for choosing Hartford were because of the price and soundness of the company's capital surplus ratio. The Hartford bid also offered a $4,898,000 reversion to Crown, the highest reversion amount of the four bids deemed acceptable by Dietrich and the Board.

The next day Crown signed an agreement to deposit over 84 million dollars in plan assets with Hartford. Under the terms of the agreement, a substantial penalty estimated by Mr. Schaefer as being four million dollars would be incurred if Crown attempted to withdraw from this agreement. Thus, as of October the 10th, the annuitization of pension plans was a fait accompli, notwithstanding the assurances of notice and Court approval made by counsel for Crown to the Court and counsel for the Union at the October 4th hearing.

There is no evidence that the Board of Directors at the October 9th meeting ever sought a waiver of the 24-hour deadline for accepting Hartford's bid. There is no evidence that the Board of Directors at the October 9th meeting or prior thereto was ever presented with any of the documents pertaining to the PIUMPF merger. They received no comparisons weighing the risks and the benefits between the PIUMPF mercer and annuitization. No one ever asked their own actuary, Mr. Reed, to conduct an analysis of the PIUMPF offer.

Although Ms. Weaver said there were many issues surrounding the PIUMPF merger that were unresolved, she admitted that she never saw the PIUMPF draft merger agreement and did not specify what issues remained, other than the lack of a clear closing date for the merger. Indeed, she testified that the merger was never an acceptable alternative to annuitization in a weak industry.

Another issue cited in the October 9th Board minutes was that the PBGC had agreed to release Crown under an annuitization but not in a merger. There's no evidence that Crown or its lawyers ever actively pursued a release from PBGC as to a merger with PIUMPF. And then it's also stated with regard to the merger that, quote:

> "PBGC has express reservation at this course of action."

End quote. However, Mr. John DeFranco, an attorney with the PBGC, who worked on Crown's pension termination, testified that he never stated any reservations or concerns about a merger.

Based upon all the evidence, the Court concludes that as of no later than September the 26th, 2001, and perhaps as early as August the 30th when preliminary annuity bids were submitted, the officers and directors of Crown had determined to annuitize the pension plans and gave no serious consideration to the PIUMPF merger proposal.

The standard for granting a preliminary injunction in the Ninth Circuit is well settled. The

moving party must show either one, the likelihood of success on the merits and the possibility of irreparable injury or two, the existence of serious questions going to the merits and the balance of hardships tipping in movant's favor. Gilder, G-i-l-d-e-r versus PGA Tour, Inc. 936 F.2d 417, 422, Ninth Circuit (1991).

The law regarding the standards of conduct for fiduciaries under ERISA is also well settled. Pension plan trustees', quote:

> "...decisions must be made with an eye (single) to the interest of the participants and beneficiaries."

End quote. Donovan versus, (that's D-o-n-v-a-n) versus Bierwirth, B-i-e-r-w-i-r-t-h, 680 F.2d 263, 271, Second Circuilt (1982), quoted in Pilkington PLC, (that's P-i-l-k-i-n-g-t-o-n) PLC versus Perelman, (P-e-r-e-l-m-a-n) 73 F.3d 1396, Ninth Circuit (1995).

This is particularly difficult but particularly important when the trustees of a plan serve in a dual fiduciary capacity. Although it is frequently the case that plan trustees have dual loyalties and nothing in ERISA prohibits a trustee from having conflicting fiduciary roles, (See Fren (Phonetic) versus Sanwa Bank, California 35 F.3d 466, 467 Ninth Circuit 1994), quote:

> "It may be virtually impossible for fiduciaries to discharge their duties with an eye to the interest of the beneficiaries and the fiduciaries may need to step aside, at

> least temporarily, from the management of assets where they face potentially conflicting interests."

End quote. Lay versus Engle (Phonetic) 727 F.2d 113, 125, Seventh Circuit (1984) quoted in Pilkington PLC versus Perelman, 72 F.3d 1396, 1401, Ninth Circuit (1995).

As the court noted in Lay versus Engle, quote:

> "Whether fiduciaries with devoted loyalties make an intensive and scrupulous investigation of the plans and investment options may be highly probative of the fiduciaries' loyalties."

End quote. 726 F.2d at 126, quoted in Pilkington PLC, 72 F.3d at 1401.

Based upon all the evidence presented, I find that there are serious questions whether the conduct of Crown's officers and Board of Directors was directed more at fulfilling their fiduciary obligations to the creditors of an insolvent corporation than at fulfilling their fiduciary obligations to the corporation's pensioners.

Whether motivated by the prospect of a reversion, which Mr. Evans admitted was at least a minor motivating factor in choosing to annuitize the plans, or the desperate financial circumstances of Crown by October of 2001, or the need to obtaining a confirmed plan and a wind-up of the company, or the certainty that Crown would receive a release from

the PBGC if the annuitization route were chosen, or all of the above, the evidence strongly suggests that the officers and directors of Crown did not make the, quote, "intensive and scrupulous investigation of the plan's investment options," end quote, that the circumstances required particularly given their dual fiduciary capacity.

Indeed the sequence of events described above raises a serious question whether the investigation into the PIUMPF merger was a ruse from the outset designed to lead the Union into believing that a merger was under serious consideration without any intention of ever really considering a merger option if an annuitization was possible.

Had there been no prospect of a merger with another plan, then the Board's course of conduct in choosing Hartford almost surely would have passed muster. But once the merger option was raised, the Board had a fiduciary duty to fully explore it and determine which option was truly in the beneficiaries' best interests. The fact that the company was out of cash and had a timetable for plan confirmation should have played no part in that determination.

Crown insists that plan termination is a business decision and thus Crown owed no fiduciary obligation to the pensioners in terminating the plans. Although the decision to terminate a plan is a business decision, both ERISA and the case law impose fiduciary responsibilities as to discretionary actions taken to implement that decision. Waller versus Blue Cross of California, 32 F.3d 1337, 1342,

Ninth Circuit (1994). See 29 USC Section 1002(21)(a).

The decision whether to annuitize the plans or merge them into PIUMPF was such a discretionary act. Crown also insists that since the beneficiaries will receive all the monetary benefit they are entitled to under the Hartford annuity, there is no injury and thus no grounds for an injunction. But, quote:

> "ERISA expressly prohibits the use of assets for purposes other than the best interests of the beneficiaries and the language of Section 1109(a) providing for disgorgement of profits from improper use of trust assets is the appropriate remedy."

End quote. Lay versus Engle, 727 F.2d 113, 122.

Thus, although the beneficiaries may not lose financially as a result of Crown's decision to annuitize, Crown should not be entitled to profit from its fiduciary oversight in failing to make a thorough investigation into the PIUMPF merger. In the context of Rule 65 of the Federal Rules of Civil Procedure, as between the creditor body of Crown and the beneficiaries of the pension funds, the balance of hardships tips sharply in favor of the beneficiaries.

Accordingly, for the reasons stated, the motion for a preliminary injunction is granted. It would serve no one's purpose at this point to attempt to unwind the Hartford transaction and risk a lawsuit

and the potential loss of four million dollars. However, the Defendants are directed to place any reversion paid by Hartford into an interest-bearing account pending a final decision on this matter.

The parties are directed to investigate and report back to the Court within 30 days on the feasibility of investing this reversion into one or more Crown Employee Benefit Plans.

It is so ordered.

Does anyone have any questions? To the extent that Rule 65 requires findings of fact and conclusions of law, those are my findings and conclusions as stated into the record in accordance with Rule 52 and 7052 of the Bankruptcy Rules. And if you would like a copy of the findings and conclusions, you may order a copy of the transcript.

MR. RAISNER: Your Honor, Christian Raisner on behalf of -- (inaudible.)

THE COURT: I did not -- we did not pick up your remarks, Mr. Raisner. I'm sorry.

MR. RAISNER: I'm sorry. Let me try again. Can you hear me now?

THE COURT: Yes, I can.

MR. RAISNER: Yes. As to the question previously asked, whether the parties would stipulate to the extent that a consolidation with the merits was required, on behalf of the Plaintiffs, we would stipulate.

THE COURT: Well, I'll ask the company again, are you willing to stipulate?

MS. WARREN: Well, Your Honor, I think you asked that question before you issued your ruling -

THE COURT: Yes, I did.

MS. WARREN: -- for a reason, and now that we have your ruling, we need to think about the consequences of it.

THE COURT: Okay. That's fair enough.

MS. WARREN: I do have one question, Your Honor -- well, I have two. First of all, you'd like a report back from us 30 days from today about annuitizing versus a merger with PIUMPF?

THE COURT: No. No, ma'am. I'm sorry if I didn't make myself clear. I'd like a report back in 30 days regarding the possibility of somehow taking the -- whatever the reversion is and investing that reversion in some manner of fashion in some employee -- Union Employee Benefit Plans, not -- at this point, the merger with PIUMPF, unless that's possible as well, and I don't know whether it is, but as far as I'm concerned, the annuitization of the pension plans is done. I'm not going to -- the injunction doesn't address that, and I think I specifically indicated that I'm not going to try to unwind that.

MR. RAISNER: Your Honor, Christian Raisner. May I inquire so that there not be any confusion as

to the meaning of the terms. The amount of the reversion that we're seeking might be an issue. I just want to make sure that we're talking about the same amount. We understand the amount at issue to be anything remaining after the purchase of the annuity, and what was reported was -- I believe it was 4.8 million approximately.

THE COURT: Almost 4.9 and -

MR. RAISNER: Okay.

THE COURT: -- my understanding -- that's why I don't want anything more than a report in 30 days. It may not -- it may take longer than 30 days because I'm not going to make the company saddle any taxes from the reversion. There was mention in the hearing -- and we didn't take get into details -- but if there are taxes that are due and owing on this reversion, I'm not going to make the company pay those out of their own meager assets. They'll come out of this reversionary fund. So basically, we would be talking about whatever is left after any taxes are paid, if there are any.

MR. RAISNER: If -- I believe, Your Honor, there may be a serious question. There may not be the same tax. I believe the tax would apply if there is a reversion to the company. It may not apply at all.

THE COURT: Well, that may very well be, but I don't -- I don't know enough at this point to even get into that and I'm certainly not going to try to at this point.

MS. WARREN: Yes, Your Honor, we can make that part of a report. There is a tax that would apply, and we can set forth our understanding of it, and if the Plaintiffs have different information, they can get that to you too.

THE COURT: That's fine.

MS. WARREN: But we can make that part of our report.

THE COURT: Okay. That's fine.

MR. RAISNER: Your Honor?

THE COURT: Yes.

MR. RAISNER: Your Honor, If I may make one request, and I believe that it will be no problem, but I'd like to request it on the record that any information necessary will be freely shared on request during this 30-day period, so that while we're preparing these reports or -

THE COURT: Well, I would assume that that's the case. I would hope that there's not going to be any of the contentiousness -- although it wasn't terribly contentious -- but there was some contentiousness that attended the pre-trial period as to this particular motion. And I would hope that the parties can just cooperate and get this done. So I don't anticipate that being a problem. I hope not.

MS. WARREN: That's fine, Your Honor. We don't lave any problem with that.

THE COURT: Okay. Anything further? Do you want an expedited copy of the transcript?

MS. WARREN: Yes, please.

THE COURT: All right. Then we'll order -- I will order one and we'll get two copies made, and I will leave it to Ms. Passadore to make sure that that gets done and sent to you. All right.

MS. WARREN: All right. Your Honor, would you like a written report in 30 days?

THE COURT: Yes, I would.

MS. WARREN: Okay. We'll submit that and of course we'll have to consult with our creditors and so on as part of this --

THE COURT: Okay.

MS. WARREN: -- and we'll try to do that as promptly as possible.

THE COURT: Very well.

MR. RAISNER: Your Honor, I do understand that both sides are to make --

THE COURT: Well, both sides can make one if they want to. I anticipate that -- I anticipated one report that would be a collaborative effort, but if you both want to make a report, that's fine.

MR. RAISNER: I would suggest that we could certainly attempt to collaborate. I would like to try that.

THE COURT: Okay. And then -

MR. RAISNER: But I just want to make sure that my clients have the ability to --

THE COURT: You can both submit a report. You can submit a joint report. It doesn't matter to me. Just give me a report in 30 days, okay?

MR. RAISNER: Very well.

THE COURT: All right.

MS. WARREN: That's fine.

THE COURT: Thank you.

MR. RAISNER: Thank you.

MS. WARREN: Thank you, Your Honor.

THE COURT: Off the record. Thank you very much.

(Whereupon, the proceeding are concluded at 3:28 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

DATED: December 14, 2001

By: /s/

Jo McCall

IN RE: CROWN VANTAGE, INC.
Debtor.
Employer I.D. # 54-1752384

PACE INTERNATIONAL UNION, ET AL,
Plaintiffs

v.

CROWN VANTAGE, INC., ET AL,
Defendants.

Case No. 00-41584 N
A. P. No. 01-4375 AN

United States Bankruptcy Court
Northern District of California
Oakland Division

[JOINT PROPOSED] ORDER ON MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs' motion for preliminary injunction having been granted on December 11, 2001, the Court's Findings and Conclusions as stated in the attached transcript are fully incorporated in this Order, and now additionally clarified as follows.

All cash assets remaining in the pension plan as of the date hereof, and any interest subsequently earned thereon (the "Cash Assets"), shall remain in the pension trust, invested in a money market fund

or other suitable interest bearing investment(s). No reversion or other payment of such Cash Assets to the Defendants shall occur, pending a decision by this Court on the allocation of those Cash Assets remaining after the discharge of all liabilities and obligations of the pension plan (the "Surplus"). Any adjustments made to the Cash Assets in the course of discharging such liabilities and obligations shall be referred to collectively as the "Required Adjustments." Nothing in this Order shall be read to prohibit or otherwise delay: (i) except as set forth in the preceding sentence, the termination of the pension plan in accordance with Section 4041(b) of ERISA, including, without limitation, the distribution of plan assets to satisfy benefit liabilities; (ii) the payment of administrative expenses from plan assets as they become due; or (iii) the continued administration of the pension plan and its termination in accordance with the terms of the plan or as requited by applicable law; provided, however, that any expense charged to the pension plan shall be in accordance with the guidelines issued by the U.S. Department of Labor, including, without limitation, DOL Advisory Opinion 2001-01A; and provided, further, however, that the Defendants shall not charge to the pension plan any legal costs or expenses incurred in the defense of this adversary proceeding, or incurred by Crown Vantage Inc. in its settler decision as plan sponsor of the pension plan to purchase the annuity from the Hartford Life Insurance Company instead of pursuing a merger of the pension plan into PIUMFF. No plan assets shall be distributed, transferred, paid or otherwise removed from the pension trust, except as set forth

in (i) – (iii), above, without reasonable notice to the Plaintiffs' counsel, and the Defendants shall provide the Plaintiffs' counsel with detailed information about the nature and amount of such distribution, transfer, payment or removal, as soon as practicable.

The parties shall submit to the Court their report on the feasibility of applying the Surplus for the benefit of the pension plan participants. The Plaintiffs shall submit a report to the Defendants on January 10, 2002 and the patties shall confer and attempt to agree on a joint report to be made by February 4, 2002.

Good cause appearing, IT IS SO ORDERED.

Dated: February 5, 2002

/s/
United States Bankruptcy Judge

IN RE: CROWN VANTAGE, INC.
Debtor.
Employer I.D. # 54-1752384

PACE INTERNATIONAL UNION, ET AL,
Plaintiffs

v.

CROWN VANTAGE, INC., ET AL,
Defendants.

Case No. 00-41584 N
A. P. No. 01-4375 AN

United States Bankruptcy Court
Northern District of California
Oakland Division

PARTIES' JOINT REPORT PURSUANT TO COURT'S DECEMBER 11, 2001 ORDER

TO THE HONORABLE RANDALL J. NEWSOME, UNITED STATES BANKRUPTCY JUDGE:

Pursuant to this Court's order dated December 11, 2001, as modified pursuant to this Court's ruling on January 7, 2002, and by agreement of the parties dated February 4, 2002 and attached hereto as Exhibit A (as modified, the "December 11 Order"), the parties respectfully report as follows:

RECITAL OF FACTS

Crown Vantage Inc. was the plan sponsor and plan administrator of, among others, twelve hourly employee pensions plans that have been merged together into one pension plan (the "Merged Plan").[1] The Merged Plan has been terminated, effective as of December 31, 2001. On October 11, 2001, Crown purchased an annuity (the "Annuity") from the Hartford Life Insurance Company, to satisfy certain benefit liabilities and effect a standard termination of the Merged Plan, in accordance with Section 4041(b) of ERISA. As of October 11, the Merged Plan had assets of approximately $89 million. The premium for the Annuity was approximately $84 million, and, therefore, after the payment of the Annuity premium, approximately $5 million in cash remained in the Merged Plan.

On November 15, 2001, the plaintiffs brought the above-captioned proceeding against the defendants. On December 11, 2001, the Court made Findings of Fact and Conclusions of Law, which, by oral stipulation of the parties, became final. Pursuant to the December 11 Order, the defendants are required to retain all Cash Assets in the Merged Plan, less any Required Adjustments, pending a decision by this Court on the allocation of the Surplus. In the December 11 Order, the Court also

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[1] Except where otherwise indicated, all capitalized terms are defined as set forth in December 11 Order, the terms of which are incorporated herein by reference, in their entirety.

directed the parties to report to the Court regarding how the Surplus could be distributed exclusively for the benefit of the participants of the Merged Plan.

JOINT REPORT REGARDING DISTRIBUTION OF THE SURPLUS

As required by the December 11 Order, the plaintiffs and defendants make this joint report (the "Joint Report") to the Court, suggesting how the Surplus could be distributed exclusively for the benefit of the participants of the Merged Plan. The Surplus could be distributed as follows:

A. The defendants shall make all Required Adjustments as soon as reasonably practicable after the date that this Joint Report is "So Ordered" by the Court (the "So Ordered" Joint Report, referred to as the "Joint Report and Order"), but in no event later than required by the terms of the Merged Plan or applicable law.

B. After all required Adjustments have been made, the defendants shall:

1. With respect to that amount of the Surplus attributable to employee contributions made by participants during their working lives, amend the Merged Plan to provide for the equitable distribution of such amount to the participants who made such contributions, or their beneficiaries. While the parties agree that this distribution is not required pursuant to Section 4044(d)(3) of ERISA, the amount to be so

distributed shall be calculated in accordance with the provisions of Section 4044(d)(3), as if the entire Surplus was to revert to the defendants; and

2. Amend the Merged Plan to provide for the distribution of the remaining Surplus, if any, to all retirees and terminated vested participants who (i) terminated employment with Crown Vantage Inc. on or after August 22, 1995, and surviving spouses of such retirees and terminated vested participants, and (ii) continue to have an accrued benefit under the Merged Plan as of December 31, 2001. This benefit shall be distributable in the form of an immediate cash lump sum, and for each recipient, shall be equal to the percentage of the remaining Surplus represented by the fraction (a) divided by (b), where (a) equal that recipient's credited service (or, in the case of a surviving spouse, the credited service of the relevant deceased participant) under the Merged Plan (determined, in the case of each participant, under the service credit rules of the Merged Plan applicable to such participant for purposes of calculating such participant's accrued benefit under the Merged Plan), and (b) equals the sum of such service for all such recipients and deceased participants.

C. The parties agree that in no event shall the sum of, (i) the aggregate amount of the distribution calculated in accordance with paragraph B, subsection 1, above, and (ii) the aggregate amount of

the benefit calculated in accordance with paragraph B, subsection 2, above, exceed the amount of the Surplus.

DISPUTED ISSUES

In addition to the terms above, to which the parties agree, the defendants seek an order that there shall be no distribution of the Surplus, and no amendment made to the Merged Plan, to effect the foregoing, prior to the exhaustion or waiver by any defendant, creditor, or other party-in-interest, of any right such person or entity may have to appeal or otherwise challenge the Court's December 11 Order, this Joint Report and Order, or any other ruling of this Court in the above-captioned proceeding. Plaintiffs do not agree to this request.

Moreover, plaintiffs seek an order providing that PACE, rather than the plan administrator, shall provide the requisite notice of these additional benefits to the recipients. Defendants do not agree to this request.

Respectfully submitted,
Dated this 4th day of February, 2002

/s/
Van Bourg, Weinberg, Roger & Rosenfeld
By Christian L. Raisner
Attorneys for Plaintiffs

Respectfully submitted,
Dated this ___ day of February, 2002

/s/
Shearman & Sterling
By Mary Warren
Attorneys for Defendants

ORDER

Good cause appearing, IT IS SO ORDERED. The Preliminary Injunction shall remain in effect until this ORDER is fully effectuated.

Dated: February 5, 2002
By: /s/
Judge of the United States Bankruptcy Court

JEFFREY H. BECK,
LIQUIDATING TRUSTEE OF THE ESTATES OF
CROWN VANTAGE, INC. AND CROWN PAPER COMPANY,
Appellant,

v.

PACE INTERNATIONAL UNION,
ON BEHALF OF MEMBER AND FORMER MEMBER
PARTICIPANTS IN PENSION PLANS SPONSORED BY THE
DEBTORS; ET AL.
Appellees

Nos. 03-15303, 03-15331
D.C. Nos. CV-02-01407-MHP
01-4375N
Northern District of California, San Francisco

United States Court of Appeals
for the Ninth Circuit

ORDER

Before: REINHARDT, PAEZ, and BERZON, Circuit Judges.

The panel has voted unanimously to deny the Petition for Rehearing and the Petition for Rehearing En Banc.

The full court has been advised of Appellant's Petition for Rehearing En Banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b).

Therefore, the Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

FILED

Jan 10 2006

Cathy A. Catterson, Clerk
U.S. Court of Appeals